CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934

No. 20

THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK, PETITIONER,

vs.

KENNETH V. BROWNELL, AS RECEIVER OF THE PEOPLES NATIONAL BANK AND TRUST COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 30, 1934

CERTIORARI GRANTED MAY 21, 1934

SUPREME COURT OF THE UNITED STATES

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1 Pleas of the District Court of the United States for the Southern District of Indiana, at the United States Court House in the City of Indianapolis, in said District, before the Honorable Robert C. Baltzell, Judge of said District Court.

Kenneth V. Brownell as Receiver of the Peoples National Bank and Trust Company
vs.
The Metropolitan Casualty Insurance Company of New York.
} No. 9393 Law.

Be It Remembered that heretofore to wit: at the November Term of said Court, on the 15th day of January, 1932, before the Honorable Robert C. Baltzell, Judge of said Court, the following proceedings in the above cause were had, to wit:

Comes now the plaintiff by its attorneys, and files complaint in the above entitled cause, which complaint is as follows: (H. I.)

And thereupon there issued out of the office of the Clerk of this Court, a writ of summons for the defendant to the United States Marshal.

Jan. 15, 2

UNITED STATES DISTRICT COURT

Indianapolis Division,

Southern District of Indiana.

9393

The President of the United States of America To the Marshal of the Southern District of Indiana, Greeting:

You Are Hereby Commanded, That you summon Metropolitan Casualty Insurance Company of New York (Jackson K. Landers, Agent, Guaranty Building, Indianapolis) late of your District, if it may be found therein, so that it be and appear within 20 days after service of this summons before the United States District Court for the Southern District of Indiana, at Indianapolis next to answer to Peoples National Bank & Trust Company.

And have you then and there this writ.

Witness, the Honorable Robert C. Baltzell, United States District Judge at Indianapolis this 15th day of January A. D. 1932.

ALBERT C. SOGEMEIER
Clerk.

(Seal)

By THELMA M. RIEBELING
Deputy Clerk.

UNITED STATES MARSHAL'S RETURN.

Southern District of Indiana, } ss.

Received the within writ the 15th day of January, 1932, and executed same upon the within named Metropolitan Casualty Insurance Co. of New York, by reading the same to and within the hearing of, and by delivering a true copy of this writ to Jackson Landers, agent of said company, at Indianapolis, Marion County, Indiana, January 15, 1932, he being the highest representative of said company found in my district.

ALF O. MELOY
U. S. Marshal.

By HARRY E. GATES
Deputy Marshal.

Marshal's Costs:
1 Service $2.00

(Endorsed) No. 9393 United States District Court Southern District of Indiana Indianapolis Division Peoples National Bank & Trust Company vs. Metropolitan Casualty Insurance Company of New York Summons Filed Jan 18 1932 Albert C. Sogemeier, Clerk Returnable twenty days after service Miller & Miller, Attorney for Plaintiff.

3 And afterwards to wit: at the May Term of said Court, on the 22nd day of September, 1932, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein to wit: Filed Sept 1932.

Comes now the plaintiff, by its attorneys, and files motion for leave to file amended complaint, which motion is as follows: (H. I.)

And the Court being duly advised grants said motion, and the plaintiff now files amended complaint, which is as follows:

4 IN THE DISTRICT COURT OF THE UNITED STATES

For the Southern District of Indiana

Indianapolis Division.

Peoples National Bank & Trust Company, *Plaintiff*
vs.
Metropolitan Casualty Insurance Company of New York, *Defendant.*
No. 9393 At Law.

AMENDED COMPLAINT ON INDEMNITY BOND.

Peoples National Bank & Trust Company, plaintiff, complains of the defendant, Metropolitan Casualty Insurance Company of New York, and for a cause of action alleges as follows:

Clause One.

That this is a suit of a civil nature; that the matter in controversy herein exceeds, exclusive of interest and costs, the sum or value of $3,000.00 and is wholly between citizens of different states, in this, to wit: that the plaintiff herein is a

national banking corporation organized and existing under the laws of the United States of America and having its principal office and place of business at the City of Sullivan, in Sullivan County, State of Indiana, and in the Southern District of Indiana; and that the defendant is a corporation organized and existing under and by virtue of the laws of the State of New York and having its principal office and place of business in the City, County and State of New York;

5 Clause Two.

That on and prior to the 19th day of November, 1928, the plaintiff herein operated its business under the name and style of The National Bank of Sullivan, Indiana; that on or about the 19th day of November, 1928, said The National Bank acquired the assets and business of a certain other banking corporation, organized under the laws of the State of Indiana and having its office and place of business in the City of Sullivan, County of Sullivan and State of Indiana, known as the Peoples State Bank and at about the same time the name of the plaintiff was changed to Peoples National Bank & Trust Company, under which name it has ever since operated and this suit is being prosecuted;

Clause Three.

That the defendant at all times herein mentioned was and is now engaged in the State of Indiana, and elsewhere in the United States, in the business of making contracts of indemnity insurance, including fidelity bonds;

Clause Four.

That on or about the 12th day of March, 1927, said defendant entered into a contract of indemnity insurance with The National Bank of Sullivan, wherein and whereby said defendant was designated as the "Underwriter" and the said bank as the "Insured"; that the form, provisions, terms, conditions and phraseology of said bond were prepared and made solely by defendant and said insured had no part in the preparation or making thereof.

6 That by the terms of said bond said defendant, in consideration of a certain premium required to be paid by said insured, which was duly paid, indemnified said insured against direct loss of money or securities or both in which insured had a pecuniary interest in an amount not exceeding $5,000.00, when such loss occurred, as stated in said bond, "through any dishonest act on the part of any Employee of

Insured." That Section 1 of said bond above referred to reads as follows:

"Definition Of Dishonesty. (1) 'Dishonesty' as used in this instrument includes wrongful abstraction, misapplication or misappropriation and/or any other dishonest, fraudulent or criminal act, wherever committed and whether done by the employee directly or in collusion or connivance with others."

Section 2 of said bond provides as follows:

"Definition of Employee. (2) That the term "Employee', as used herein, embraces all officers and employees of the Insured, except inactive Vice-Presidents and Directors other than officers, wherever they may be located, and whether employed regularly or temporarily."

That on to wit: November 23, 1928, an endorsement was executed by defendant and attached to said bond and
7 made a part thereof, by means of which defendant agreed that the name of said insured, or principal, under said bond had been changed from "The National Bank of Sullivan" to "The National Bank and/or Peoples National Bank of Sullivan, Indiana".

That said bond was designated by defendant as No. A-30199; that said bond was written for a period of one year, was renewed on March 12, 1928, and remained in full force and effect until it was cancelled by plaintiff on or about December 15, 1928.

That subsequent to the cancellation of said bond the original thereof was delivered to the defendant; that said defendant now has the same in its possession; that plaintiff has demanded of defendant that it re-deliver said bond or an exact copy thereof to it, but that defendant has at all times failed and refused so to do; that because of the foregoing plaintiff cannot attach to its complaint an exact copy of said bond.

Plaintiff further alleges that it has obtained a specimen copy of the form on which said bond was written, which, plaintiff is informed and therefore alleges the fact to be, contains provisions identical with those in the original bond as issued; that a copy of said specimen bond is attached hereto, made a part hereof and marked "Exhibit A". That a copy of said endorsement attached to said original bond is attached hereto, made a part hereof and marked "Exhibit B".

Clause Five.

That the plaintiff herein has performed all the terms and conditions of said bond on its part to be performed; that plaintiff discovered losses suffered by it as more particularly hereinafter alleged, which losses occurred by reason of
8 certain forged and worthless notes executed and given to plaintiff subsequent to March 12, 1928 and up to December 15, 1928, within a few days subsequent to the 16th day of January, 1929; that within fifteen days after the discovery of said loss, it notified defendant thereof; that within four months thereafter, and on or about the 12th day of April, 1929, plaintiff furnished defendant with due proof of said loss as in said bond required.

That the notes referred to as causing said loss, and for which proof of loss was duly made, are enumerated in paragraph (b) of Clause Seven of plaintiff's amended complaint.

That in addition thereto, plaintiff suffered certain losses by reason of forged notes, which losses were not discovered at the time said proof of loss hereinabove referred to was furnished defendant; that said loss is in adddition to that referre to in said proof of loss; that certain forged notes were given plaintiff between the date of March 12, 1927 and March 1, 1928; that said notes are more particularly referred to in paragraph (a) Clause Seven of plaintiff's amended complaint.

Plaintiff further alleges that the defendant has waived its right to refuse payment of said loss on the ground that plaintiff has failed to submit proper proofs thereof, by reason of the fact that defendant, in either March or April, 1931, employed certified public accountants, who made an independent examination of the books and records of the plaintiff and the circumstances surrounding such loss to ascertain the extent thereof by reason of said forged notes;

9 Clause Six

That at the time that the name of this plaintiff was changed to that under which it now operates and for several years prior thereto and at the time of the execution of the bond here in suit and at all times covered by said bond, and continuously up to the morning of the 16th day of January, 1929, one Edgar D. Maple was an employee of the plaintiff, occupying the position of Assistant Cashier, Trust Officer and Clerk, was active in the business of said bank, and that dur-

ing said time said Maple had principally in his charge the matter of loans and credits to other banks and to individual customers of plaintiff; that at all of said times the office of said Maple was in the banking rooms of plaintiff in the building known as No. 2 East Washington Street, in Sullivan, Indiana; that on the morning of said 16th day of January, 1929, said Edgar D. Maple came to his death in said Bank as a result of a gunshot wound;

Clause Seven.

Plaintiff further alleges that while said Edgar D. Maple was acting as Assistant Cashier, Trust Officer and Clerk and was in the employ of said plaintiff, and while said bond was in full force and effect, the plaintiff sustained losses within the meaning of said bond which were discovered within the time provided in said bond, of money and securities through the dishonest acts of said Edgar D. Maple while acting alone or in collusion with others, as follows, to wit:

10 (a) That said Maple as such employee, knowingly and dishonestly received from said First State Bank of Shelburn or from Jessup F. Bolinger, its President, accepted on behalf of plaintiff and gave credit therefor to said First State Bank of Shelburn on the books and records of plaintiff as though they were genuine, certain promissory notes which were forged, worthless, wholly invalid and void; that each of said notes were accepted on behalf of plaintiff as aforesaid, between the dates of March 12, 1927, and March 1, 1928; that the aggregate amount of said notes was the sum of $42,238.00; that each of said notes bore interest at the rate of 6% per annum and each matured prior to March 1, 1928; that the name appearing on each of said notes and the amount of each, is as follows:

Name	Amount
C. H. Lloyd	$4,500.00
Wyatt Dix	
Delilah Dix	2,500.00
Shelburn Nash Motors Co.	
W. H. Bolinger	4,500.00
J. P. Brust	200.00
B. O. Buckley	
Bessie Buckley	
O. B. Stark	350.00
Buzard Bros.	

Name	Amount
G. S. Buzard	
J. W. Buzard	1,800.00
Wyatt Dix	500.00
Hud Hill	
Ora E. Hill	300.00
John Hayes	200.00
Fred A. Lane	
Porter Shepherd	1,000.00
Willard Miller	
John W. Miller	625.00
Walter McHugh	
J. W. McHugh	1,500.00
J. W. McHugh	2,500.00
Daisy Newton	
F. W. Newton	2,500.00
Nicholson Bros.	
Calvin Nicholson	1,600.00
Nicholson Bros.	
E. H. Nicholson	
Calvin Nicholson	5,000.00
Calvin Nicholson	500.00
Pierson Allen Lumber Co.	
M. V. Allen	1,500.00
H. A. Stevenson	364.00
O. B. Stark	4,500.00
Z. C. Shield & Son	
John T. Shields	400.00
Henry P. Tuech	
Edward White	300.00
Walter Wyman	
Zena Brown	2,000.00
Pierson Allen Lbr. Co.	
H. V. Allen	1,500.00
Hud Hill	
Ora E. Hill	1,100.00
Robert Davidson	
Oliver Cromwell	499.00
Total	$42,238.00

12 (b) That said Maple as such employee knowingly and dishonestly received from said First State Bank of Shelburn or from Jessup F. Bollinger, its President, accepted on behalf of plaintiff and gave credit therefor to said First State

Bank of Shelburn on the books and records of plaintiff as though they were genuine, certain promissory notes which were forged, worthless, wholly invalid and void; that the dates, forged names of the makers, time and amounts of said notes are as follows:

13 Dates	Names	Time	Amounts
July 16, 1928	Carl Austin	180 days	$200.00
Nov. 30, 1928	Flora Bolinger	180 days	300.00
Aug. 2, 1928	E. C. Bolinger Flora Bolinger	180 days	600.00
Aug. 4, 1928	Harry Banister	180 days	200.00
July 20, 1928	Buzard Bros. G. S. Busard J. W. Buzard	180 days	500.00
Nov. 9, 1928	A. L. Boyer	180 days	2,500.00
July 31, 1928	Roy Benson A. K. Benson	180 days	100.00
Aug. 11, 1928	A. K. Benson	180 days	200.00
July 28, 1928	A. K. Benson	180 days	300.00
Nov. 28, 1928	Gean Claustre	180 days	350.00
July 26, 1928	Oliver Cromwell	180 days	250.00
Nov. 20, 1928	W. H. Coonce David W. Coonce James H. Case	180 days	1,000.00
Aug. 2, 1928	O. D. Clayton John L. Hayes	180 days	300.00
Oct. 7, 1928	W. P. Carey Anna Carey	90 days	2,000.00
Sept. 17, 1928	Fred Cline	120 days	2,000.00
Oct. 5, 1928	J. T. Gaskin & Son J. T. Gaskin	90 days	2,200.00
July 20, 1928	W. E. Gaskins Porter Shepherd R. E. Greenwood	180 days	7,500.00
Nov. 21, 1928	J. T. Gaskins Porter Shepherd	90 days	9,000.00
July 21, 1928	G. P. German	180 days	1,400.00
Dec. 10, 1928	Greenwood Brown R. E. Greenwood Fred Greenwood	180 days	2,500.00
July 23, 1928	Fred Hall Ida Hall	180 days	200.00

14 Dates	Names	Time	Amounts
Sept. 19, 1928	J. L. Hayhurst	180 days	$2,500.00
July 26, 1928	Alfred W. Hill		
	John D. Hill, Sr.	180 days	390.00
Aug. 12, 1928	F. M. Hall	180 days	800.00
Aug. 1, 1928	Ida S. Hamilton	180 days	1,500.00
Aug. 9, 1928	Bert Jones	180 days	1,500.00
July 10, 1928	L. V. Martin		
"	John R. Martin	180 days	500.00
Dec. 1, 1928	L. V. Martin		
	John B. Martin	180 days	1,000.00
July 7, 1928	W. T. Marts	180 days	800.00
July 9, 1928	A. C. Myers		
	Wm. N. Myers	180 days	200.00
Aug. 6, 1928	Daisy Newton	180 days	400.00
June 23, 1928	Diana O'Neil	180 days	1,500.00
July 13, 1928	B. W. Porter		
	Dorre Porter		
	J. T. Gaskins	180 days	1,500.00
Oct. 11, 1928	Max Peterson		
	Roscoe Peterson	180 days	285.00
Oct. 11, 1928	Noah Par	180 days	1,250.00
Aug. 9, 1928	Rosa Riggs	180 days	2,000.00
Oct. 19, 1928	G. G. Robbins	180 days	1,500.00
July 17, 1928	H. V. Stark	180 days	6,500.00
Nov. 26, 1928	C. R. Turner	180 days	2,500.00
Dec. 10, 1928	Elmer Taylor	180 days	400.00
Aug. 7, 1928	Len R. Taylor		
	Flora Taylor		
	W. D. Taylor,		
	(His Mark)	180 days	300.00
Aug. 8, 1928	John R. Taylor	180 days	400.00
Dec. 5, 1928	Ed Weir	180 days	2,000.00
July 23, 1928	T. J. Watson	180 days	300.00
15 July 26, 1928	J. H. Wrork	180 days	$400.00
July 27, 1928	Jos. A. Wardell	180 days	1,000.00
May 25, 1928	Chas. W. Thompson	180 days	3,400.00
	Robert Renick		
	G. D. Renick		500.00
	Robert Renick		
	G. D. Renick		889.78
	Total		$69,814.78

16 That the amounts of the transactions listed and set forth in this Clause Seven of this complaint aggregate the principal sum of $112,052.78, which amount was lost to this plaintiff through the dishonest acts of said Edgar D. Maple as aforesaid, while an employee of this plaintiff and while acting as such employee alone and in collusion with others and while said bond was in full force and effect.

Clause Eight.

That because of the foregoing plaintiff is entitled to recover of the defendant the sum of $10,000.00 with interest thereon at the rate of six per cent. per annum.

Wherefore, plaintiff demands judgment against the defendant in the sum of $10,000.00 with interest thereon from the 12th day of April, 1929, at the rate of six per cent. per annum, costs and all other proper relief in the premises.

CHARLES D. HUNT
MILLER & MILLER
Attorneys for Plaintiff.

17 EXHIBIT A.

Casualty Insurance
Fidelity & Surety
Bonds
Semper Progrediens.

The Metropolitan Casualty Insurance Co. of New York
Chartered 1874
Home Office—55 Fifth Avenue
(A Stock Company)

No. Specimen

hereinafter referred to as the Underwriter in consideration of an annual premium, hereby agrees to indemnify
The National Bank of Sullivan

Insuring Clause

hereinafter referred to as the Insured, against loss through dishonesty on the part of any Employee of the Insured, the amount of insurance on each of such employes being
Five Thousand Dollars ($5,000.00/100).
It Is Further Agreed:

Definition of Dishonesty.

(1) That "Dishonesty" as used in this instrument includes wrongful abstraction, misapplication or misappropriation

and/or any other dishonest, fraudulent or criminal act, wherever commited and whether done by the employee directly or in collusion or connivance with others.

Definition of Employee

(2) That the term "Employee", as used herein, embraces all officers and employees of the Insured except inactive Vice-Presidents and Directors other than officers, wherever they may be located, and whether employed regularly or temporarily.

Liability for Loss Due to One or More of a Group.

(3) That in case a loss is shown to be due to one or more of a group of employees, it shall not be necessary to designate the specific employee causing the loss but the aggregate liability of the Underwriter for any such loss shall not exceed the amount of insurance on one employee.

Occurrence Discovery and Reporting of Loss.

(4) That loss is covered hereunder only if the acts causing such loss occur while this insurance is in force and are discovered and reported to the Underwriter within two (2) years after the termination of this insurance.

Notice and Proof of Loss.

(5) That the Insured shall, as soon as it is reasonably possible, and in any event within fifteen (15) days after learning that loss has been sustained, give the Underwriter notice of loss, and within four (4) months, shall file with the Underwriter an itemized statement of claim, duly sworn to, and shall upon request make available for investigation by the Underwriter all books and other records relating to the claim.

Time for Investigation by the Underwriter.

(6) That the Underwriter shall have two (2) months after presentation of sworn statement of claim within which to verify same by appropriate investigation, during which time no legal proceedings shall be brought against the Underwriter as to that claim, nor may such proceedings be brought at all as to that claim after the expiration of fifteen (15) months from the date of its presentation.

Effective Date; Cancelaltion

(7) That this insurance shall become effective as of the date of this instrument, and shall remain in force until can-

celled; and this insurance shall be deemed cancelled upon the date that may be specified in a written notice of cancellation served by the Underwriter upon the Insured or by the Insured upon the Underwriter. If the notice shall be served
19 by the Underwriter, the date specified shall not be less than thirty (30) days after such service. The Underwriter shall upon demand refund the unearned premium.

Cancellation As to Any One Employee

(8) Discovery of loss on account of any employee shall terminate this insurance as to that employee; and the serving by the Underwriter upon the Insured of notice that it is unwilling longer to be liable for the acts of any employee shall, at the end of fifteen (15) days, terminate this insurance as to that employee.

Disposition of Salvage

(9) That in the event loss on account of any one employee exceeds the amount of insurance on that employee, the Underwriter shall be entitled to participate in any salvage from said employee only after the Insured shall have been fully reimbursed.

Signed, Sealed and Dated at ..... the 12'' day of March, 1927.

THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK

By.....

(The words Good Faith appear in large letters across the face of the bond)

20 EXHIBIT B.

General 25
Casualty Insurance
Fidelity & Surety
Bonds
Semper Progrediens

Chartered April 22nd 1874

The Metropolitan Casualty Insurance Co. of New York.

No. A-30199 $.....

It is hereby understood and agreed that the name of the Principal under bond number A-30199, to which this endorsement is attached, has been changed from The National Bank

of Sullivan, Indiana, to The National Bank and/or Peoples National Bank and Trust Company of Sullivan, Indiana.

This endorsement is attached to and forms a part of bond number A-30199, executed by the undersigned as Surety, on the 12th day of March, 1927.

In Witness Whereof, The Metropolitan Casualty Insurance Company of New York, by its Attorney-in-fact, has affixed its name and caused the seal of said County to be affixed thereto this 23rd day of November, 1928.

THE METROPOLITAN CASUALTY INSURANCE CO.
OF NEW YORK
By JACKSON K. LANDERS
(Seal) *Attorney-in-fact*

ed Sept. 27, 1932.

21 And afterwards to wit: at the May Term of said Court, on the 27th day of September, 1932, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit:

Comes now the defendant, by its attorneys, and files motion to strike out parts of amended complaint, which motion is as follows:

22 (Caption)

MOTION TO STRIKE OUT PARTS OF AMENDED COMPLAINT.

Defendant moves the court for an order striking out of the amended complaint in this cause the following allegations and each of them:

1. In Clause Five, commencing at line 12, page 5, and ending with line 28, page 5, which allegation is as follows:

"That in addition thereto, plaintiff suffered certain losses by reason of forged notes, which losses were not discovered at the time said proof of loss hereinbefore referred to was furnished defendant; that said loss is in addition to that referred to in said proof of loss; that certain forged notes were given plaintiff between the dates of March 12, 1927 and March 1, 1928; that said notes are more particularly referred to in paragraph (a) Clause Seven of plaintiff's amended complaint.

"Plaintiff further alleges that the defendant has waived its right to refuse payment of said loss on the ground that plaintiff has failed to submit proper proofs thereof, by reason of the fact that defendant, in either March or April, 1931, employed certified public accountants, who made an independent examination of the books and records of the plaintiff and the circumstances surrounding such loss to ascertain the extent thereof by reason of said forged notes;" for the reason that said allegations are irrelevant, and immaterial; the complaint shows on its face that none of said losses was discovered and reported to defendant within two years after the termination of the insurance, as required by Clause 4 of the bond attached as Exhibit "A". The complaint specifically alleges that plaintiff terminated the bond by cancellation on December 15, 1928 and no investigation made in March or April, 1931, more than two years thereafter, could constitute a waiver of the failure to discover and report within the said period of two years; moreover, the complaint does not even allege that said losses were discovered by defendant as a result of the alleged examination.

2. All of paragraph (a) Clause 7, commencing at line 1, page 7 and ending at line 12, page 9, which reads as follows: "That said Maple as such employee, knowingly and dishonestly received from said First State Bank of Shelburn or from Jessup F. Bolinger, its President, accepted on behalf of plaintiff and gave credit therefor to said First State Bank of Shelburn on the books and records of plaintiff as though they were genuine, certain promissory notes which were forged, worthless, wholly invalid and void; that each of said notes were accepted on behalf of plaintiff as aforesaid, between the dates of March 12, 1927, and March 1, 1928; that the aggregate amount of said notes was the sum of $42,238.00; that each of said notes bore interest at the rate of 6% per annum and each matured prior to March 1, 1928; that the name appearing on each of said notes and the amount of each, is as follows:

Name	Amount
C. H. Lloyd	$4,500.00
Wyatt Dix	
Delilah Dix	2,500.00
Shelburn Nash Motors Co.	
W. H. Bolinger	4,500.00
J. P. Brust	200.00
B. O. Buckley	

Name	Amount
Bessie Buckley	
O. B. Stark	350.00
Buzard Bros.	
G. S. Buzard	
J. W. Buzard	1,800.00
Wyatt Dix	500.00
Hud Hill	
Ora E. Hill	300.00
John Hayes	200.00
Fred A. Lane	
Porter Shepherd	1,000.00
Willard Miller	
John W. Miller	625.00
Walter McHugh	
J. W. McHugh	1,500.00
J. W. McHugh	2,500.00
Daisy Newton	
F. W. Newton	2,500.00
Nicholson Bros.	
Calvin Nicholson	1,600.00
Nicholson Bros.	
E. H. Nicholson	
Calvin Nicholson	5,000.00
Calvin Nicholson	500.00
Pierson Allen Lumber Co.	
W. V. Allen	1,500.00
H. A. Stevenson	364.00
O. B. Stark	4,500.00
Z. C. Shield & Son	
John T. Shields	400.00
Henry P. Tuech	
Edward White	300.00
Walter Wyman	2,000.00
Zena Brown	
Pierson Allen Lbr. Co.	1,500.00
H. V. Allen	
Hud Hill	1,100.00
Ora E. Hill	
Robert Davidson	499.00
Oliver Cromwell	
Total	$42,238.00"

for the reason that said allegations are immaterial and irrelevant; that the notes referred to involve the same losses referred to in the allegations sought to be stricken out in Specification 1 of this motion, and it affirmatively appears from the amended complaint that such losses were not discovered and reported to defendant within two years after the termination of said bond; that no examination made after the expiration of said two-year period could constitute a waiver thereof; and that no recovery can be had for said losses or any of them under the allegations of the amended complaint and the provisions of the bond sued on;

Wherefore, defendant prays that the foregoing motion be sustained.

NOEL, HICKAM, BOYD & ARMSTRONG
Attorneys for the Defendant.

26 And afterwards to wit: at the May Term of said Court, on the 2nd day of November, 1932, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit: Entered N 1932.

Come now the parties by their respective attorneys, and the defendant's motion to strike out parts of plaintiff's amended complaint, is now submitted to the Court, and the Court being duly advised, orders that said motion be and the same is hereby sustained.

27 And afterwards to wit: at the November Term of said Court, on the 18th day of November, 1932, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit:

Comes now the defendant, by its attorneys, and files demurrer to amend complaint, which demurrer is as follows:

Nov. 18, 2. 28 • • (Caption) • •

DEFENDANT'S DEMURRER TO AMENDED COMPLAINT.

Defendant in the above entitled cause demurs to the amended complaint in said cause, and as ground for demurrer says that said complaint fails to state facts sufficient to constitute a cause of action against defendant.

NOEL, HICKAM, BOYD & ARMSTRONG
Attorneys for Defendant.

MEMORANDUM OF GROUNDS.

1. The record shows that this action was commenced on January 15, 1932.

2. The amended complaint shows on its face that the claim sued on was presented to the defendant on or be-
29 fore April 12, 1929, more than fifteen months, and, in fact, almost three years prior to the commencement of the action.

3. Paragraph 6 of the bond sued on provides that no proceedings shall be brought as to a claim after the expiration of fifteen months from the date of its presentation.

4. The above provision limiting the time of commencing action to fifteen months after the date of the presentation of the claim provides a reasonable period of time for the commencement of the action, and is a valid contractual stipulation.

5. In so far as Section 9139 Burns' Ann. Stat. 1926 has been or may be construed to render such a provision invalid where the insurance company is a foreign one, and the limitation is for a period of less than three years, such statute denies to foreign insurance companies the equal protection of the laws in contravention of the 14th Amendment to the Constitution of the United States, and is invalid.

NOEL, HICKAM, BOYD & ARMSTRONG
Attorneys for Defendant.

30 And afterwards to wit: at the November Term of said Court, on the 27th day of January, 1933, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit: Entered Jan. 1933.

Come now the parties by their respective attorneys and the defendant's demurrer to the plaintiff's amended complaint is now submitted to the Court, and the Court being duly advised orders that said demurrer be and the same is hereby overruled, to which ruling of the Court said defendant excepts.

31 And afterwards to wit: at the November Term of said Court, on the 28th day of February, 1933, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit: Filed Feb. 2 1933.

Comes now the defendant by its attorneys and files answer to the plaintiff's amended complaint, which answer is as follows:

32 • • (Caption) • •

DEFENDANT'S ANSWER.

For answer to the amended complaint in the above entitled cause, defendant says: That the bond sued on and attached to the amended complaint as Exhibit A provides that no proceedings may be brought as to any claim after the expiration of fifteen months from the date of its presentation. That the claims sued on were presented to the defendant by plaintiff on or about the twelfth day of April, 1929. That no proceedings were brought with reference thereto until the commencement of this action on the fifteenth day of January, 1932. That during all of said time defendant has been duly qualified and admitted to transact business in the State of Indiana as an underwriter of policies of casualty insurance and fidelity and other surety bonds and has during all of said time been engaged in transacting such business throughout the State of Indiana, and has during all of said time had

agents in practically every county of said state upon whom service of process against defendant could have been
33 made, and has maintained a branch office for the management of all of defendant's business in the State of Indiana at the City of Indianapolis, Marion County, Indiana. Defendant further says that under the laws of the State of Indiana, corporations organized under the laws of the State of Indiana engaged in exactly the same business as defendant, and competing with defendant, are permitted to insert in their policies of insurance and fidelity bonds provisions limiting the time within which actions must be commenced upon said policies and bonds by the obligees thereof to periods of one year after the occurrence of a loss, or less, and that such provisions are valid and binding under the laws of said state, and that no recovery may be had upon said policies of insurance and fidelity bonds except by the commencement of an action within such period, unless waived in some manner by said companies. That Sect. 9139, Burns' Ann. Stat. 1926, being Sect. 6 of Ch. XV of the Acts of 1865, special session of the Acts of the General Assembly of Indiana, has been construed by the courts of the State of Indiana as prohibiting the insertion of such a provision where the period fixed is less than three years, where the company issuing such policy of insurance or bond is incorporated under the laws of a state other than the State of Indiana, and has been admitted to transact its business in the State of Indiana as a foreign corporation. That such statute so constitutes an unreasonable and arbitrary discrimination against this defendant and all other companies organized under the laws of states other than Indiana and transacting a casualty insurance and fidelity bond business in the State of In-
34 diana, and imposes burdens not imposed upon Indiana corporations transacting the same kind and class of business, and denies to defendant and others similarly situated the equal protection of the laws in contravention of the Fourteenth Amendment to the Constitution of the United States. That by reason thereof said statute of the State of Indiana is invalid and void and cannot and does not invalidate the provisions of the bond sued on. That by reason of the failure of plaintiffs to commence this action within the time limited in said bond, recovery of all claims sued on in this action was forever barred and any liability of defendant therefor wholly discharged.

Wherefore, defendant prays judgment that plaintiff take

nothing by its complaint; that defendant recover the costs of this action, and for all other proper relief.

NOEL, HICKAM, BOYD & ARMSTRONG
Attorneys for the Defendant.

35 And afterwards, to wit: at the November Term of said Court, on the 4th day of March, 1933, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit: Filed Mar. 1933.

Comes now the parties by their respective attorneys and the plaintiff files its verified motion to substitute Kenneth V. Brownell, Receiver of Peoples National Bank & Trust Company, as party plaintiff, which motion is in the words and figures following, to wit:

36 * * (Caption) * *

MOTION TO SUBSTITUTE PARTY PLAINTIFF.

Comes now the plaintiff and shows to the Court that subsequent to the commencement of this action Kenneth V. Brownell has been duly appointed Receiver of the plaintiff and that by reason thereof said Brownell should be substituted as party plaintiff.

Wherefore, defendant moves that Kenneth V. Brownell, Receiver of Peoples National Bank & Trust Company, be substituted as party plaintiff.

CHARLES D. HUNT
MILLER, MILLER & JEFFREY
Attorneys for Plaintiff.

37 State of Indiana } ss:
County of Marion }

SIDNEY S. MILLER, being first duly sworn, deposes and says:

That he is one of the attorneys for plaintiff and as such is authorized to make this affidavit; that he has read the foregoing motion and that the facts therein are true.

SIDNEY S. MILLER

Subscribed and sworn to before me this 3rd day of March, 1933.

My commission expires April 4, 1933.

HILDRETH J. WORKMAN
Notary Public.

(Seal)

ered Mar. 4, 933.

38 (Entry for Mar. 4, 1933, Continued)

And said motion is now presented to the Court, and the Court being duly advised in the premises, sustains the same and orders that said Kenneth V. Brownell, Receiver of Peoples National Bank & Trust Company, be and he is hereby substituted as party plaintiff.

Comes now the plaintiff and files his demurrer to defendant's answer to plaintiff's amended complaint, which demurrer is in the words and figures following, to wit:

d Mar. 4, 933.

39 • • (Caption) • •

PLAINTIFF'S DEMURRER TO DEFENDANT'S ANSWER.

The plaintiff demurs to defendant's answer to plaintiff's amended complaint on the ground that said answer does not state facts sufficient to constitute a defense to said amended complaint.

Plaintiff attaches hereto and makes a part hereof his memorandum in support of said demurrer.

CHARLES D. HUNT
MILLER, MILLER & JEFFREY
Attorneys for Plaintiff.

40 MEMORANDUM.

Defendant's demurrer is insufficient to state a defense to plaintiff's complaint in each of the following particulars, to-wit:

1. That plaintiff's action was filed herein within three years after proofs of loss were furnished by plaintiff to defendant;

2. That the provision in the bond sued on, which was exe-

cuted by the defendant, providing that an action shall not be brought on any claim thereunder after the expiration of fifteen months from the date of its presentation, is void under the laws of the State of Indiana;

3. The Legislature of Indiana has the legal right to specify under what conditions a foreign corporation can transact business in said state;

4. That the provisions of Sec. 9139 Burns Revised Statutes, 1926, being Sec. 6 of Chap. 15 of the Acts of 1865, Special Session of the General Assembly of the State of Indiana, and the decisions of the courts of said state, do not constitute an unreasonable and arbitrary discrimination against this defendant and other foreign corporations transacting a casualty insurance and fidelity bond business in the state of Indiana;

5. That said statute does not deny to the defendant or other corporations similarly situated, the equal protection of the laws in controvention of the 14th Amendment to the Constitution of the United States.

CHARLES D. HUNT
MILLER, MILLER & JEFFREY
Attorneys for Plaintiff.

41 (Entry for March 4, 1933 Continued) Entered Ma 1933.

And said demurrer is now submited to the Court, and the Court being duly advised orders that said demurrer be and the same is hereby sustained, to which ruling of the Court said defendant at the time excepts, and refuses to answer over, and elects to stand on the Court's ruling on defendant's demurrer to plaintiff's amended complaint, and on the Court's ruling on plaintiff's demurrer to defendant's answer to plaintiff's amended complaint, and refuses to plead further.

Upon said defendant's refusal to plead further the Court now enters judgment for plaintiff under the allegations of said amended complaint and against defendant in the sum of $6113.33 and costs.

It Is Therefore Ordered, Adjudged and Decreed by the Court that plaintiff have and recover of the defendant the sum of $6,133.33 and his costs laid out and expended in the sum of $.....

42 (Further Entry for March 4, 1933)

Come Now the parties, by their respective attorneys, and the defendant now files its petition for appeal and also files it assignment of errors, which are respectively as follows:

1 Mar. 4, 33. 43 • • (Caption) • •

PETITION FOR APPEAL.

To the Honorable Robert C. Baltzell, Judge of the District Court of the United States, for the Southern District of Indiana, Indianapolis Division.

Comes Now The Metropolitan Casualty Insurance Company of New York, petitioner herein, and defendant in said cause, by its attorneys, and respectfully shows to the Court that on the 4th day of March, 1933, a final judgment was entered against your petitioner upon its election to stand on the court's ruling on its demurrer to the plaintiff's amended complaint and on the court's ruling on the plaintiff's demurrer to its answer and its refusal to plead or answer further. The above named defendant, feeling itself aggrieved by the said rulings and the judgment so rendered and entered in the above entitled cause, does hereby appeal from said judgment to the United States Circuit Court of Appeals for the Seventh Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and it asks that its appeal be allowed and that citation be issued, as provided by
44 law, and that a duly authenticated transcript of the record and proceeding herein may be transmitted forthwith to said United States Court of Appeals for the Seventh Circuit, under the rules of such court in such cases made and provided.

And your petitioner, defendant herein, further asks that the proper order relating to the security required of it be made, and desiring to supersede the execution of the judgment, your petitioner here tenders bond in such amount as the court may require for such purpose, and asks that with the allowance of the appeal a supersedeas be issued.

NOEL, HICKAM, BOYD & ARMSTRONG,
Attorneys for Defendant.

45 • • (Caption) • • Filed Mar. 1933.

ASSIGNMENT OF ERRORS.

Comes Now The Metropolitan Casualty Insurance Company of New York, defendant in the above entitled cause, and shows that in the determining of and judgment of said cause, manifest errors were committed to the prejudice of said defendant in the following particulars and each of them, to-wit:

(1) The District Court erred in overruling the demurrer to the plaintiff's amended complaint herein.

(2) The District Court erred in sustaining the plaintiffs demurrer to defendant's answer to the amended complaint herein.

(3) The District Court erred in rendering judgment against the defendant upon its election to stand upon the court's rulings on the defendant's demurrer to the amended complaint and on the plaintiff's demurrer to defendant's answer to the amended complaint and upon defendant's refusal to plead or aswer further.

Wherefore, defendant prays that the judgment of said court be in all things reversed with directions to sustain the demurrer to plaintiff's complaint and overrule demurrer to defendant's answer, and for all other proper relief.

NOEL, HICKAM, BOYD & ARMSTRONG,
Attorneys for Defendant.

46 (Further Entry for March 4, 1933 Continued)

The defendant having filed its petition for appeal accompanied by an assignment of errors in the above cause, and it appearing to the court that due notice of this proceeding has been given to the plaintiff,

It Is Ordered that an appeal to the United States Circuit Court of Appeals for the Seventh Circuit, from the judgment heretofore entered in this cause on the 4th day of March, 1933, be, and the same is hereby allowed on the filing with the clerk of this court by said defendant of a good and sufficient bond in the sum of Seven Thousand Five Hundred Dollars ($7500) conditioned that if said defendant shall prosecute said appeal to effect and answer in damages and costs if it fails to make said appeal good, then said obligation will be void, otherwise to remain in full force and effect.

And the defendant now files its Appeal Bond with The Commercial Casualty Insurance Company of Newark, New Jer-

sey, as surety thereon, which said bond and surety are approved by the court and which bond is in the words and figures following, to wit:

Mar. 4, 1933. 47 • • (Caption) • •

APPEAL BOND.

Know All Men by These Presents that we, The Metropolitan Casualty Insurance Company of New York, as principal, and The Commercial Casualty Insurance Company of Newark, New Jersey, as surety, are held and formally bound unto Kenneth V. Brownell, as Receiver of the Peoples National Bank and Trust Company, plaintiff and appellee in the above entitled cause, in the sum of Seven Thousand Five Hundred Dollars ($7500), to be paid to the said Kenneth V. Brownell as Receiver of the Peoples National Bank and Trust Company, for the payment of which sum well and truly be made, we bind ourselves, our heirs and assigns, jointly and severally by its presents.

Sealed with our seals, and dated this 4th day of March, 1933.

Whereas, the above named The Metropolitan Casualty Insurance Company of New York has prosecuted an appeal to the United States Circuit Court of Appeals for the Seventh Circuit to reverse the judgment of the District Court of
48 the United States for the Southern District of Indiana, Indianapolis Division, which said judgment was rendered in said cause on the 4th day of March, 1933;

Now, Therefore, it is a condition of this obligation that if the above named The Metropolitan Casualty Insurance Company of New York shall prosecute said appeal to effect and answer in damages and costs if it fails to make said appeal good, then said obligation will be void, otherwise to remain in full force and effect.

THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK,

Principal

By JACKSON K. LANDERS (Seal)

Attorney in fact.

THE COMMERCIAL CASUALTY INSURANCE COMPANY,

Surety

By JACKSON K. LANDERS (Seal)

Attorney in fact.

49 (Further Entry for March 4, 1933 Continued) Entered M 1933.

And the said bond having been filed and approved by this court, all further proceedings in this court on said judgment shall be and they are hereby suspended until the determination of said appeal by said United States Circuit Court of Appeals for the Seventh Circuit; and defendant also files praecipe for transcript for use on appeal, which praecipe is in the words and figures, following:

50 • • (Caption) • • Filed Mar. 1933.

PRAECIPE.

To the Clerk of the District Court of the United States for the Southern District of Indiana:

You will please prepare and certify to the transcript of the above entitled cause for appeal to the United States Circuit Court of Appeals for the Seventh Circuit, pursuant to law, and include therein the following:

(1) The amended complaint;
(2) Marshal's return of service;
(3) Motion to strike out parts of the amended complaint;
(4) Entry sustaining motion to strike out parts of the amended complaint;
(5) Defendant's demurrer to the amended complaint;
(6) Entry overruling defendant's demurrer to the amended complaint;
(7) Defendant's answer;

51 (8) Plaintiff's motion for substitution of parties plaintiff;
(9) Entry substituting parties plaintiff;
(10) Plaintiff's demurrer to defendant's answer to amended complaint;
(11) Entry sustaining demurrer to defendant's answer to amended complaint;
(12) Entry showing defendant's election to stand on the court's ruling on defendant's demurrer to plaintiff's amended complaint and on the court's ruling on plaintiff's demurrer to defendant's answer to plaintiff's amended complaint and defendant's refusal to plead further;
(13) Judgment and entry;
(14) Defendant's petition for appeal;
(15) Defendant's assignment of errors;

(16) Order allowing appeal and approved appeal bond and surety;
(17) Appeal bond;
(18) Citation and proof of service thereof;
(19) This praecipe;
(20) All entries concerning filing or entry of the above mentioned papers or orders, and exceptions and rulings.

NOEL, HICKAM, BOYD & ARMSTRONG
Attorneys for Defendant.

Service of the above praecipe and receipt of a copy thereof and hereby acknowledged, this 4th day of March, 1933, at Indianapolis, Indiana.

CHARLES D. HUNT
MILLER, MILLER & JEFFREY
Attorneys for Plaintiff.

56 United States of America
Southern District of Indiana } ss:
Indianapolis Division

I, Albert C. Sogemeier, Clerk of the United States District Court in and for the Southern District of Indiana, do hereby certify that the above and foregoing is a true and full transcript of the record and proceedings in the cause of *Kenneth V. Brownell as Receiver of The Peoples National Bank and Trust Company* v. *The Metropolitan Casualty Insurance Company of New York*, No. 9393 Law, according to the praecipe filed March 4, 1933, now remaining among the records of said Court in my office.

I further certify that the original Citation has been incorporated into said transcript.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Indianapolis, this 22nd day of March, 1933.

ALBERT C. SOGEMEIER
(Seal) *Clerk, United States District Court, Southern District of Indiana.*

52 (Further Entry for March 4, 1933 Continued).

And the defendant also files citation duly acknowledged by the plaintiff, which said citation is in the words and figures, following, to wit:

53 * * (Caption) * *

CITATION ON APPEAL.

Filed Mar. 4, 1933.

To Kenneth V. Brownell, As Receiver of the Peoples National Bank and Trust Company, Greetings:

You are hereby notified that in a certain action at law in the United States District Court of the United States, for the Southern District of Indiana, Indianapolis Division, wherein you, Kenneth V. Brownell, as Receiver of the Peoples National Bank and Trust Company, are plaintiff, and The Metropolitan Casualty Insurance Company of New York, is defendant, an appeal has been taken by the said defendant to the United States Circuit Court of Appeals for the Seventh Circuit, from the judgment rendered against said defendant in favor of said plaintiff in said United States District Court; on the 4th day of March, 1933.

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Seventh Circuit, to be held in the City of Chicago, thirty (30) days after the date of this citation, to show cause, if any there
54 be, why the aforesaid judgment appealed from should not be corrected and speedy justice done to the parties in that behalf.

Witness the Honorable Robert C. Baltzell, Judge of the District Court of the United States for the Southern District of Indiana, Indianapolis Division, this 4th day of March, 1933.

ROBERT C. BALTZELL
Judge of the District Court of the United States for the Southern District of Indiana.

We hereby acknowledge service of the above citation this 4th day of March, 1933, and receipt of copy thereof.

CHARLES D. HUNT
MILLER, MILLER & JEFFREY
Attorneys for Kenneth V. Brownell, As Receiver of The Peoples National Bank and Trust Company.

[fol. 1] At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States Court room, in the City of Chicago, in said Seventh Circuit on the fourth day of October, 1932, of the October Term in the year of our Lord One Thousand Nine Hundred and Thirty-Two, and of our Independence the One Hundred and Fifty-Seventh.

4969

THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK

vs.

KENNETH V. BROWNELL, as Receiver of the Peoples National Bank and Trust Company

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division

And on, to-wit: On the twenty-eighth day of March, 1933, there was filed in the office of the clerk of this court an appearance of counsel for appellant, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, OCTOBER TERM, 1932

No. 4969

THE METROPOLITAN CASUALTY INSURANCE COMPANY et al.

vs.

KENNETH V. BROWNELL, as Receiver, etc.

The Clerk will enter *my* appearance as counsel for the appellant.

James W. Noel, Hubert Hickam, Alan W. Boyd, Robert D. Armstrong, 130 E. Washington St., Indianapolis, Ind.

Endorsed: Filed March 28, 1933, Frederick G. Campbell, Clerk.

[fol. 2] And afterwards, to-wit: On the sixteenth day of May, 1932, there was filed in the office of the Clerk of this court an appearance of counsel for Appellee, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, OCTOBER TERM, 1932

No. 4969

THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK

vs.

KENNETH V. BROWNELL, as Receiver, etc.

The Clerk will enter *my* appearance as counsel for the appellees.

Charles D. Hunt, Sidney S. Miller, 1356 Consolidated Bldg., Indianapolis, Indiana.

Endorsed: Filed May 16, 1933, Frederick G. Campbell, Clerk.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States Court room, in the City of Chicago, in said Seventh Circuit, on the third day of October, 1933, of the October Term, in the year of our Lord One Thousand Nine Hundred and Thirty-Three, and of our Independence the One Hundred and Fifty-Eighth.

[fol. 2½] And afterwards, to-wit: On the twenty-second day of November, 1933, the following further proceedings were had and entered of record, to-wit:

Wednesday, November 22, 1933.

Court met pursuant to adjournment and was opened by proclamation.

Before Hon. Evan A. Evans, Circuit Judge; Hon. William M. Sparks, Circuit Judge; Hon. Louis FitzHenry, Circuit Judge

4969

METROPOLITAN CASUALTY INSURANCE COMPANY

vs.

KENNETH V. BROWNELL, as Receiver, etc.

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel and on oral arguments by Mr. Alan W. Boyd, counsel for appellant, and by Mr. Sidney S. Miller, counsel for appellee, and the court having heard the same takes this matter under advisement.

And afterwards, to-wit: On the twelfth day of January, 1934, there was filed in the office of the Clerk of this court the opinion of the court, which said opinion is in the words and figures following, to-wit:

[fol. 3] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, OCTOBER TERM, 1933, JANUARY SESSION, 1934

No. 4969

THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK, Appellant,

vs.

KENNETH V. BROWNELL, as Receiver of the Peoples National Bank and Trust Company, Appellee

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division

January 12, 1934

Before Evans, Sparks, and FitzHenry, Circuit Judges

FITZHENRY, Circuit Judge:

This action was brought upon a bond, executed by appellant whereby it agreed to indemnify the Peoples National Bank and Trust Company to the extent of $5,000 for

losses occurring by reason of the dishonesty of any employe, to recover the full penalty of the bond for losses alleged to have occurred by reason of the dishonesty of the cashier of said bank. Appellant demurred to the amended complaint, which demurrer was overruled, and it thereupon filed an answer, to which a demurrer of appellee was sustained. Appellant elected to stand upon its pleadings and refused to plead further, and the court thereupon entered a judgment for appellee for the full penalty of said bond with interest, from which judgment this appeal is taken. The errors relied on arise out of the rulings of the court on the demurrer to the amended complaint and the demurrer to the answer, to each of which rulings the appellant duly excepted.

[fol. 4] The amended complaint alleges in substance that on or about the 12th day of March, 1927, the appellant, in consideration of an annual premium, executed the bond in question, by the terms of which it agreed to indemnify the Peoples National Bank and Trust Company, of which appellee is receiver, to the extent of $5,000 for any losses resulting from the dishonesty of any employee of said bank. Said bond remained in force until December 15, 1928, at which time it was cancelled by the bank. During the years 1927 and 1928 while the bond was in force, losses are alleged to have occurred through the dishonesty of one Edgar D. Maple, cashier, in receiving notes, from the president of another bank, which he knew to be forged and for which he gave full credit on the books of the bank. The losses for each year exceeded the penalty of the bond. The 1927 losses were eliminated from the amended complaint by a motion to strike out all allegations with reference to such losses, which was sustained. The losses for the year 1928 are alleged to have been discovered within a few days subsequent to January 16, 1929. It is further alleged that within fifteen days thereafter the bank notified appellant of the loss and within four months thereafter, on April 12, 1929, furnished appellant due proof of loss in accordance with the terms of the bond.

The bond sued on contains, among others, the following provisions:

"Time for Investigation by the Underwriter.

"(6) That the Underwriter shall have two (2) months after presentation of sworn statement of claim within

which to verify same by appropriate investigation, during which time no legal proceedings shall be brought against the Underwriter as to that claim, nor may such proceedings be brought at all as to that claim after the expiration of fifteen (15) months from the date of its presentation."

This action was commenced January 15, 1932, more than fifteen months, and almost three years, after the presentation of the claim.

Appellant contends the action was not commenced within the time limited by the terms of the bond. Appellee contends, and the court held, that said provision requiring the commencement of the action within fifteen months after the presentation of the claim is rendered invalid by Section 9139 (Burns' Ann. Stat. 1926. Acts 1865, p. 105) of the Statutes of Indiana, providing as follows:

[fol. 5] "9139. (4803) Conditions forbidden—6. No such insurance company shall insert any condition in any policy hereafter issued requiring the insured to give notice forthwith, or within the (a) period of time less than five days of the loss of the insured property; * * * and any provision or condition contrary to the provisions of this section, or any condition in said policy inserted to avoid the provisions of this section, shall be void, and *no condition or agreement not to sue for a period of less than three years shall be valid.*"

As construed by the Supreme Court of Indiana, this statute purports to render invalid any provision in a policy of insurance issued by a company of another state doing business in Indiana restricting the time for commencing action to a period shorter than three years. No such restriction is imposed upon insurance companies organized under the laws of Indiana. It is appellant's contention that this statute so construed, applying only to foreign corporations, denies to such corporations the equal protection of the laws, in violation of the 14th Amendment to the Constitution of the United States; that it is consequently invalid and cannot destroy the validity of the limitation in the bond. The question is presented by the ruling of the District Court overruling appellant's demurrer to the amended complaint and sustaining appellee's demurrer to the answer which affirmatively sets up the provisions of the bond and the invalidity of the Indiana statute in question.

The sole question presented by this record is whether or not Section 9139, Burns' Ann. Stat. of Indiana is a valid enactment, in the light of the 14th Amendment to the Constitution of the United States.

The section of Burns' Annotated Indiana Statutes, the validity of which is being attacked in this case, was passed by the Legislature of Indiana in 1865, before the 14th Amendment to the Constitution of the United States was adopted. It has been upheld as a valid exercise of legislative discretion by the Supreme Court of Indiana as affecting foreign insurance companies. American Surety Co. v. Pangburn, 182 Ind. 116, 119; Caywood v. Supreme Lodge, etc., 171 Ind. 410.

Another statute (Burns' Ann. Stat. 1926, § 9037) prohibits a life insurance company from incorporating a provision in a policy limiting the time within which any action at law or equity may be commenced to less than three years [fol. 6] after the cause of action shall accrue, and this provision has also been held valid by the Supreme Court of Indiana. Ins. Co. v. Brim, 111 Ind. 281; Caywood v. Supreme Lodge, etc., supra.

The writing of an insurance contract is not a transaction in commerce, nor is the insurance contract an article of commerce, but merely a simple contract of indemnity. Paul v. Virginia, 8 Wall. 168, 181; N. Y. Life Ins. Co. v. Deer Lodge County, 231 U. S. 495, 502; National, etc. Ins. Co. v. Wanberg, 260 U. S. 71, 75.

The State of Indiana had the power to determine for itself the conditions upon which foreign insurance companies should be admitted to transact business in that state. It could have excluded them entirely, but permitting them to come into the state, it could determine upon what conditions they could transact business and make contracts, provided such conditions do not deprive such corporations of rights conferred upon them by the Constitution and Laws of the United States.

In discussing this Act, in Insurance Co. of North America v. Brim, 111 Ind. 281, the Supreme Court of Indiana said:

"While the general proposition may be conceded, that insurance companies have the right to contract that parties shall assert their claims against them within a reasonable time (Riddlesbarger v. Hartford Ins. Co., 7 Wall. 386), yet

the constitutional right of the Legislature to prescribe the terms upon which foreign corporations may transact business within the State is also abundantly established. * * *.

"The statute must be regarded as a legislative declaration, that less than three years is an unreasonable limit within which to require parties holding claims under a policy of foreign insurance to assert their claims or be forever barred. This statute was in force when the contract of insurance was consummated, and it must be conclusively presumed that the contract was made with a due regard for the law. In so far as the statute and the condition in the policy are in conflict, the statute must prevail. It is said the statute is unconstitutional. Counsel have not called our attention to any provision of the Constitution which is supposed to be infringed, and we know of none."

The 14th Amendment to the Constitution of the United States provides:

"* * * No State shall * * * deny to any person within its jurisdiction the equal protection of the laws."

[fol. 7] "Equal protection of the laws" means subjection to equal laws applying to all alike in the same situation, and it has consistently been held that states have the right to classify the subjects of legislation and make differences in regulations where substantial differences of condition exist. Phoenix Ins. Co. v. McMaster, 237 U. S. 63, 71; Fort Smith Light Co. v. The Paving District, 274 U. S. 387; Power Mfg. Co. v. Saunders, 274 U. S. 490.

Mr. Justice Day, speaking for the Supreme Court in Phoenix Ins. Co. v. McMaster, supra, used this language:

"* * * it was within the power of the State, so long as it did not impose upon the company as a condition of doing business within the State any deprivation of rights secured to it under the Federal Constitution, to determine for itself the conditions upon which such foreign corporation could do business within the State. This principle has been often affirmed by the decisions of this court, and the Insurance Company, being within that class of companies not doing an interstate business, the State might, in the exercise of its lawful authority, exclude it from doing business within the State so long as no rights conferred by the

Constitution and laws of the United States were destroyed or abridged."

In the same case, in discussing "equal protection of the laws," the Court said:

"The equal protection of the laws, as this court has frequently decided, means subjection to equal laws applying alike to all in the same situation, or as expressed by Mr. Justice Field, speaking for this court in Barbier v. Connolly, 113 U. S. 27, 31—a case much relied upon by the plaintiffs in error—equal protection of laws means 'that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances, in the enjoyment of their personal and civil rights. • • •. That no greater burdens should be laid upon any one than are laid upon others in the same calling and condition.' In this general definition, the court recognizes, as it always has, that what the equal protection of the law requires is equality of burdens upon those in like situation or condition. It has always been held consistent with this general requirement to permit the States to classify the subjects of legislation, and make differences of regulation where substantial differences of condition exist."

[fols. 8 & 9] The difference between a domestic insurance company and a foreign one is certainly substantial, and the only contention of appellant here is that the statute is void because it does not give to it the same rights and privileges that are given to insurance corporations created by the State of Indiana.

In discussing the power of the state to regulate and restrict the operations of a foreign insurance company, Mr. Justice Field, in Paul v. Virginia, supra, said:

"If, on the other hand, the provision of the Constitution could be construed to secure to citizens of each State in other States the peculiar privileges conferred by their laws, an extraterritorial operation would be given to local legislation utterly destructive of the independence and the harmony of the States • • •, and if • • • their corporate powers and franchises could be exercised in other States without restriction, it is easy to see that, with the advantages thus possessed, the most important business

of those States would soon pass into their hands. The principal business of every State would, in fact, be controlled by corporations created by other States."

The statute in question having been enacted prior to the ratification of the 14th Amendment and having remained a part of the public policy of Indiana until now, it cannot be even suggested that the legislature had any design upon nullification of the 14th Amendment, but was attempting to establish a public policy for the State. We cannot say that when the legislature provided one set of regulations to control domestic insurance companies and another to control foreign insurance companies, the latter provisions applying uniformly to all corporations within the class, was arbitrary; but, upon the contrary, it was based on a real and substantial difference, having a reasonable relation to the subject of the particular legislation. Power Mfg. Co. v. Saunders, 274 U. S. 490.

The judgment of the District Court is affirmed.

[fol. 10] And on the same day to-wit: On the twelfth day of January, 1934, the following further proceedings were had and entered of record, to-wit:

Friday, January 12, 1934.

Court met pursuant to adjournment and was opened by procla-tion.

Before Hon. Evan A. Evans, Circuit Judge; Hon. William M. Sparks, Circuit Judge; Hon. Louis FitzHenry, Circuit Judge

4969

THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK

vs.

KENNETH V. BROWNELL, as Receiver of the Peoples National Bank and Trust Company

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division

This cause came on to be heard on the transcript of the record from the District Court of the United States for

the Southern District of Indiana, Indianapolis Division, and was argued by counsel.

On consideration whereof: It is now here ordered and adjudged by this court that the judgment of the said District Court in this cause be, and the same is hereby affirmed with costs, and interest from the date of the judgment of said District Court until paid, at the same rate that similar judgments bear in the courts of the State of Indiana.

[fol. 11] And afterwards, to-wit: On the thirtieth day of January, 1934, there was filed in the office of the Clerk of this court a petition for rehearing, which said petition for rehearing is in the words and figures following, to-wit:

[fol. 11½] [Stamp:] Filed Jan. 30, 1934. Frederick G. Campbell, Clerk.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, OCTOBER TERM, 1933, JANUARY SESSION, 1934

No. 4969

THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK, Appellant,

v.

KENNETH V. BROWNELL, as Receiver of the Peoples National Bank and Trust Company, Appellee

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division

Hon. Robert C. Baltzell, Judge

APPELLANT'S PETITION FOR REHEARING

James W. Noel, Hubert Hickam, Alan W. Boyd, Robert D. Armstrong, Indianapolis, Indiana, Counsel for Appellant. Charles D. Hunt, Sullivan, Indiana. Samuel D. Miller, Sidney S. Miller, Indianapolis, Ind., Counsel for Appellee.

[fol. 12] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, OCTOBER TERM, 1933, JANUARY SESSION, 1934

No. 4969

THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK, Appellant,

v.

KENNETH V. BROWNELL, as Receiver of the Peoples National Bank and Trust Company, Appellee

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division

Hon. Robert C. Baltzell, Judge

Appellant's Petition for Rehearing

The appellant, The Metropolitan Casualty Insurance Company of New York, respectfully presents this its petition for rehearing in the above-entitled cause, and submits as grounds therefor the following:

1. The court erred in affirming the judgment of the United States District Court for the Southern District of Indiana, Indianapolis Division, in the above-entitled cause.

[fol. 13] 2. The court erred separately in overruling and denying each of the several assignments of error made by appellant in the above-entitled cause.

3. The court erred in holding that the provision of appellant's bonds requiring the commencement of an action within fifteen months after the presentation of a claim is rendered invalid by Section 9139, Burns' Ann. Stat. 1926 (Acts of Indiana General Assembly, 1865, p. 105).

4. The court erred in holding that Section 9139, Burns' Ann. Stat. 1926 (Acts of Indiana 1865, p. 105), as construed by the Supreme Court of Indiana, is a valid legislative enactment.

5. The court erred in holding that Section 9139, Burns' Ann. Stat. 1926 (Acts 1865, p. 105), does not deny to appellant the equal protection of the laws in violation of the

Fourteenth Amendment to the Constitution of the United States.

6. The court erred in impliedly holding that a statute enacted prior to the Fourteenth Amendment to the Constitution of the United States would remain valid after the adoption of said amendment if in conflict therewith.

7. The court erred in impliedly holding that the validity of a statute, if in conflict with the Fourteenth Amendment to the Constitution of the United States, would be affected by any intention or lack of intention on the part of the State to nullify the amendment.

[fol. 14] 8. The court erred in holding that there is a real and substantial difference between a foreign insurance company admitted to do business in the state of Indiana and a domestic insurance company of said state having any reasonable relation to the subject of the legislation in question. (Section 9139, Burns' Ann. Stat. 1926, Acts 1865, p. 105, of the General Assembly of Indiana.)

Wherefore, appellant prays the court for a rehearing in said cause and that the judgment of the District Court be in all things reversed and for all other proper relief.

James W. Noel, Hubert Hickam, Alan W. Boyd, Robert D. Armstrong, Counsel for Appellant.

[fol. 15] And afterwards, to-wit: On the twenty-eighth day of February, 1934, the following further proceedings were had and entered of record, to-wit:

Wednesday, February 28, 1934.

Court met pursuant to adjournment and was opened by proclamation.

Before Hon. Evan A. Evans, Circuit Judge; Hon. William M. Sparks, Circuit Judge; Hon. Louis FitzHenry, Circuit Judge

4969

METROPOLITAN CASUALTY INSURANCE COMPANY

vs.

KENNETH V. BROWNELL, as Receiver, etc.

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division

It is ordered by the court that the petition for rehearing in this cause be, and the same is hereby denied.

And afterwards, to-wit: On the first day of March, 1934, the following further proceedings were had and entered of record, to-wit:

Thursday, March 1, 1934.

Court met pursuant to adjournment and was opened by proclamation.

Before Hon. Evan A. Evans, Circuit Judge

[fol. 16] 4969

METROPOLITAN CASUALTY INSURANCE COMPANY

vs.

KENNETH V. BROWNELL, as Receiver, etc.

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division

Now this day comes counsel for appellant and presents a motion for a stay of the mandate of this court, pending a petition to the Supreme Court of the United States for a writ of certiorari.

On consideration whereof: It is now here ordered that the mandate in this cause be, and the same is hereby stayed until the further order of this court.

It is further ordered that counsel for appellant may proceed with diligence and promptly file the petition for a writ of certiorari in the Supreme Court of the United States and, upon the filing of said petition file in this court proof of the filing of said petition in said court.

[fol. 17] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten and printed pages, numbered from 1 to 16, inclusive, contain a true copy of the proceedings had and papers filed, excepting briefs of counsel, and order relating to the filing of briefs, and the answer to the petition for rehearing, in the case of The Metropolitan Casualty Insurance Company of New York, Appellant, vs. Kenneth V. Brownell, as Receiver of the Peoples National Bank and Trust Company, Appellee, No. 4969, October Term, 1933, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 12th day of March A. D. 1934.

Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit. (Seal United States Circuit Court of Appeals, Seventh Circuit.)

[fol. 44] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 21, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(5080-C)

FILE COPY

No. [redacted] 20

APR 16 19
CHARLES ELMORE C
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK,
Petitioner,

v.

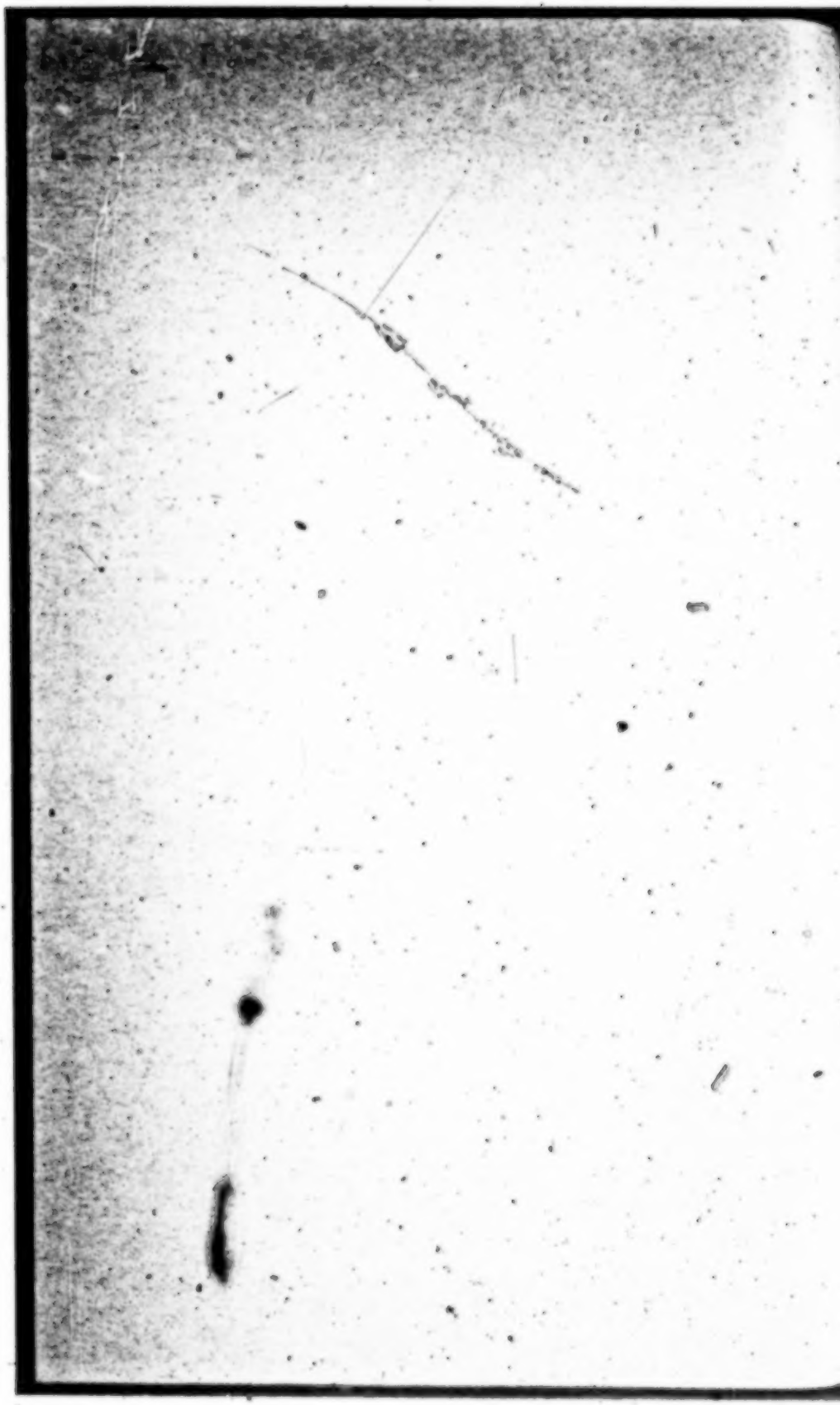
KENNETH V. BROWNELL, as Receiver of the PEOPLES NATIONAL BANK AND AND TRUST COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, WITH SUPPORTING BRIEF.

JAMES W. NOEL,
Attorney for Petitioner.

HUBERT HICKAM,
ALAN W. BOYD,
ROBERT D. ARMSTRONG,
Of Counsel.

E. A. HARDIN PRINT, INDIANAPOLIS, IND.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK,
Petitioner,

v.

KENNETH V. BROWNELL, As Receiver of the PEOPLES NATIONAL BANK AND TRUST COMPANY,
Respondent.

No. ------.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, WITH SUPPORTING BRIEF.

May It Please The Court:

The petition of The Metropolitan Casualty Insurance Company of New York respectfully presents to this Honorable Court:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This was an action at law to recover against petitioner on a bond whereby it agreed to indemnify the Peoples National Bank and Trust Company to the extent of $5000 for losses occurring by reason of the dishonesty of any employee during the effective period of said bond. The bond contains, among others, the following provision:

> "Time for Investigation by the Underwriter.
> "(6) That the Underwriter shall have two (2) months after presentation of sworn statement of claim within which to verify the same by appropriate investigation, during which time no legal proceedings shall be brought against the Underwriter as to that claim, *nor may such proceedings be brought at all as to that claim after the expiration of fifteen (15) months from the date of its presentation.*" (Our Italics.)
>
> (R. 3-14.)

An Indiana statute passed in 1865 (Sec. 9139 Burns' Ann. Stat. 1926, Indiana Acts of 1865, p. 105), provides as follows:

> "9139. (4803) Conditions forbidden.—6. No such insurance company shall insert any condition in any policy hereafter issued requiring the insured (Here follow certain immaterial provisions), * * * and any provision or condition contrary to the provisions of this section, or any condition in said policy inserted to avoid the provisions of this section, shall be void, *and no condition or agreement not to sue for a period of less than three years shall be valid.*" (Our Italics.)

As construed by the Supreme Court of Indiana, this statute purports to render invalid any provision in a policy issued by a *company of another state* doing business in Indiana restricting the time for commencing action to a period of less than three years. Domestic corporations are not so restricted.

Caywood v. Supreme Lodge, etc., 171 Ind. 410.

The action was not commenced until thirty-three months after presentation of the claim. (R. 1, 6.) Petitioner contended both by demurrer to the complaint and by special answer that there could be no recovery because of failure to commence the suit within the time limited by the bond, asserting that the applicable portion of the above statute is in conflict with the 14th Amendment to the Constitution of the United States. The demurrer to the complaint was overruled, (R. 18, 19) and a demurrer to the answer was sustained. (R. 18-23.) Petitioner refused to plead further and judgment was entered in favor of respondent. (R. 23.)

On petitioner's appeal to the Circuit Court of Appeals for the Seventh Circuit, the judgment was affirmed on the sole ground that the statute in question was valid and rendered invalid the limitation in the bond. The court assigned as reasons that the statute antedated the ratification of the 14th Amendment to the Constitution of the United States, indicating that the Legislature had no intention to nullify that amendment; that the difference between a domestic insurance company and a foreign one is substantial; and that the discrimination was not arbitrary, but based on a

real and substantial difference having a reasonable relation to the subject of the particular legislation. The court did not attempt to point out what "the real and substantial difference" is. (R. 32-38.)

This petition seeks a review of the above-mentioned judgment of the Circuit Court of Appeals for the Seventh Circuit. The opinion is found in the record at pages 32 to 38. It has not yet been published.

II.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

By said decision the Circuit Court of Appeals has sustained a statute of the State of Indiana arbitrarily discriminating against foreign insurance companies admitted to do business in Indiana, in that it prohibits such corporations from limiting by contract the time for commencement of actions on policies to a period of less than three years, while no similar limitation is imposed upon domestic insurance companies, there being no real and substantial differences pertinent to the subject in respect of which the classification is made, which decision is in conflict with Article 14 of the Articles in Amendment of the Constitution of the United States, as interpreted by this Court, and in conflict with the following applicable decisions of this Court:

Power Mfg. Co. v. Saunders, 274 U. S. 490, 493;

Quaker City Cab Co. v. Pennsylvania, 277 U. S. 398, 400, 401;

Hanover F. Ins. Co. v. Carr, 272 U. S. 494, 510;
Kentucky Finance Corporation v. Paramount Auto Exch. Corp., 262 U. S. 544,
Liggett Co. v. Baldridge, 278 U. S. 105, 111.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding that Court to certify to this Court for its review and determination, on a day certain to be herein named, all proceedings in the case numbered and entitled on its docket No. 4969, *The Metropolitan Casualty Insurance Company of New York, Appellant, v. Kenneth V. Brownell, as Receiver of The Peoples National Bank and Trust Company, Appellee*, and that the judgment of said Circuit Court of Appeals and of the District Court of the United States for the Southern District of Indiana be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may be meet and just, and your petitioner will ever pray.

THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK,
By JAMES W. NOEL,
Attorney for Petitioner.

HUBERT HICKAM,
ALAN W. BOYD,
ROBERT D. ARMSTRONG,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The opinion of the Circuit Court of Appeals for the Seventh Circuit is found in the Record at pages 32 to 38. It has not yet been published.

II.

JURISDICTION.

The date of the judgment of the Circuit Court of Appeals was January 12, 1934. (R. 39.) A petition for rehearing was seasonably filed on January 30, 1934 and denied on February 28, 1934. (R. 39, 42.) The decision affirms the judgment of the trial court.

III.

STATEMENT OF THE CASE.

Practically all essentials necessary to a consideration of this petition are set out in the petition under the "Summary Statement." (Petition, p. 2.)

IV.

ASSIGNMENTS OF ERROR.

The assignments of error are set forth in the petition under the heading of "Reasons Relied On For Allowance Of The Writ." (Petition, pp. 4, 5.)

V.

SUMMARY OF ARGUMENT.

By the decision in question, a statute of Indiana has been sustained that arbitrarily discriminates against foreign insurance corporations admitted to do business in Indiana, in violation of the Fourteenth Amendment as interpreted by this Court.

The right denied is one of substance and importance, and the discrimination is not theoretical only, but real.

The opinion of the Circuit Court of Appeals at least suggests the application of other principles in conflict with decisions of this court, such as:

1. That a statute violating the Fourteenth Amendment is any the less invalid because enacted before the ratification of that amendment;

2. That the intent or lack of intent upon the part of the State to violate the Fourteenth Amendment is material.

ARGUMENT.

By the decision a statute of Indiana has been sustained that arbitrarily discriminates against Foreign Insurance Corporations admitted to do business in Indiana, in violation of the Fourteenth Amendment as interpreted by this Court.

The sole question presented by the record in this cause is whether a State has the power to discriminate against foreign insurance corporations admitted to transact business therein by prohibiting them from inserting in policies of insurance a limitation of the time within which actions can be commenced on such policies to a period shorter than three years (or any other arbitrary period), no similar restriction being imposed upon domestic insurance companies engaged in precisely the same business. Petitioner contends that there is no difference between foreign and domestic insurance companies which would justify the discrimination and that under principles repeatedly announced by this court an *arbitrary* discrimination against foreign corporations of any character, which have been admitted to transact business in a state, violates the 14th Amendment to the Constitution of the United States by denying the equal protection of the laws.

The test laid down by this court to which the legislation must be subjected is that *classification must rest on real and substantial differences pertinent to the subject in respect of which the classification is made.* In *Power Mfg. Co. v. Saunders*, 274 U. S. 490, 493, there was involved a statute of the State of Arkansas providing that actions against foreign corporations

might be commenced in any county in the state, while actions against domestic corporations were required to be brought in counties where they had a place of business or in which their chief officer resided. A foreign corporation sued in a county where it had no place of business and no officer or agent contended that the court had no jurisdiction on account of the invalidity of the statute. This contention was denied by the Supreme Court of Arkansas, but was sustained by this court. The court said, p. 493:

> "We think it very plain that the statutes discriminate against foreign corporations and in favor of domestic corporations and individuals, and that the discrimination is not theoretical merely, but real and substantial.
>
> "The clause in the 14th Amendment forbidding a state to deny to any person within its jurisdiction the equal protection of the laws is a pledge of the protection of equal laws. (*Truax v. Corrigan*, 357 U. S. 312, 333, 66 L. ed. 254, 263, 27 A. L. R. 375, 42 Sup. Ct. Rep. 124; *Atchison, T. & S. F. R. Co. v. Vosberg*, 238 U. S. 56, 59, 59 L. ed. 1199, 1200; L. R. A. 1915E, 953, 35 Sup. Ct. Rep. 675); and extends as well to corporate as to natural persons (*Smyth v. Ames*, 169 U. S. 466, 522, 42 L. ed. 819, 840, 18 Sup. Ct. Rep. 418; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 154, 41 L. ed. 666, 667, 17 Sup. Ct. Rep. 255; *Santa Clara County v. Southern P. R. Co.*, 118 U. S. 394, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132). It does not prevent a state from adjusting its legislation to differences in situation or forbid classification in that connection; but it does require that the classification be not arbitrary, but based on a real and substantial difference having a reasonable relation to the subject of the particular

legislation. *Truax v. Corrigan, supra*, p. 337 (66 L. ed. 265, 27 A. L. R. 375, 42 Sup. Ct. Rep. 124); *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 155, 41 L. ed. 668, 17 Sup. Ct. Rep. 255; *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 75, 78, 55 L. ed. 369, 377, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160; *Ft. Smith Light & Traction Co. v. Board of Improvement.* (May 16, 1927, 274 U. S. 387, ante, 1112, 47 Sup. Ct. Rep. 595).

"No doubt there are subjects as to which corporations admissibly may be classified separately from individuals and accorded different treatment, and also subjects as to which foreign corporations may be classified separately from both individuals and domestic corporations and dealt with differently. But there are other subjects as to which such a course is not admissible, *the distinguishing principle being that classification must rest on differences pertinent to the subject in respect of which the classification is made.*

"Here the separate classification of foreign corporations is in respect of the venue or place of bringing transitory actions. The statutes mean foreign corporations doing business within the State *by her permission, and therefore having a fixed place of business therein and a resident agent on whom process may be served.* We speak only of them. So far as their situation has any pertinence to the venue of transitory actions *it is not distinguishable from that of* domestic corporations and individuals. Certainly there is no substantial difference. The opinion of the state court does not point to any relevant distinction, nor have counsel suggested any. Of course, the restricted venue as to domestic corporations and individuals is prompted by considerations of convenience and economy;

but these considerations have *equal* application to foreign corporations. *So far as the plaintiffs in such action are affected, it is apparent that there is no more reason for a state-wide venue when the action is against a foreign corporation than when it is against a domestic corporation or a natural person.* So we conclude that the special classification and discriminatory treatment of foreign corporations are without reasonable basis and essentially arbitrary.

* * *

"It of course rests with the state to prescribe the venue of actions brought in her courts. But the exercise of this power, *as of all others*, must be in keeping with the limitations which the Constitution of the United States places on state action. Procedural statutes are not excepted, but must fall like others when in conflict with those limitations. * * *"

"We accordingly reach the conclusion that the defendants' objection before stated to the validity of the venue provisions was well taken and should have been sustained under the equal protection clause of the 14th Amendment.

"Judgment reversed." (Our italics.)

This principle was affirmed by this court in *Quaker City Cab Co. v. Pennsylvania*, 277 U. S. 398, 400, where it is said:

"The equal protection clause extends to foreign corporations within the jurisdiction of the state, and safeguards to them protection of laws applied equally to all in the same situation. Plaintiff in error is entitled in Pennsylvania to the same protection of equal laws that natural persons within its jurisdiction have a right to

demand under like circumstances. *Kentucky Finance Corp. v. Paramount Auto Exch. Corp.*, 262 U. S. 544, 550, 67 L. ed. 1112, 1115, 43 Sup. Ct. Rep. 636. The equal protection clause does not detract from the right of the state justly to exert its taxing power or prevent it from adjusting its legislation to differences in situation or forbid classification in that connection, 'but it does require that the classification be not arbitrary but based on a real and substantial difference having a reasonable relation to the subject of the particular legislation.' *Power Mfg. Co. v. Saunders*, 274 U. S. 490, 493, 71 L. ed. 1165, 1167, 47 Sup. Ct. Rep. 678. It is established that a corporation, by seeking and obtaining permission to do business in a state does not thereby become bound to comply with or estopped from objecting to, the enforcement of its enactments that conflict with the Constitution of the United States. The right to withhold from a foreign corporation permission to do local business therein does not enable the state to require such a corporation to surrender the protection of the Federal Constitution. *Power Mfg. Co. v. Saunders, supra*, 497 (71 L. ed. 1169, 47 Sup. Ct. Rep. 678); *Hanover Fire Ins. Co. v. Harding* (*Hanover F. Ins. Co. v. Carr*), 272 U. S. 494, 507, 71 L. ed. 372, 379, 49 A. L. R. 713, 47 Sup. Ct. Rep. 179; *Frost & F. Trucking Co. v. Railroad Commission*, 271 U. S. 583, 593, *et seq.*, 70 L. ed. 1101, 1104, 47 A. L. R. 457, 46 Sup. Ct. Rep. 605; *Fidelity & D. Co. v.* Tafoya, 270 U. S. 426, 434, 70 L. ed. 664, 667, 46 Sup. Ct. Rep. 331; *Western U. Teleg. Co. v. Foster*, 247 U. S. 105, 114, 62 L. ed. 1006, 1016, 1 A. L. R. 1278, P. U. R. 1918D, 865, 38 Sup. Ct. Rep. 438; *Looney v. Crane Co.*, 245 U. S. 178, 188, 62 L. ed. 230, 235, 38 Sup. Ct. Rep. 85; *Sioux Remedy Co. v. Cope*, 235 U. S. 198, 203, 59 L. ed. 193, 197, 35 Sup. Ct. Rep. 57."

The principle stated by this court in *Hanover Fire Ins. Co. v. Carr,* 272 U. S. 494, 510, while in connection with the imposition of taxes, is also applicable. The court there recognized the distinction between inequalities which the foreign corporation must suffer for the privilege of being admitted to do business in the state, and those attempted to be imposed upon it after such admission, saying:

> "In subjecting a law of the state which imposes a charge upon foreign corporations to the test whether such a charge violates the equal protection clause of the 14th amendment, a line has to be drawn between the burden imposed by the state for the license or privilege to do business in the state and the tax burden which, having secured the right to do business, the foreign corporation must share with all the corporations and other taxpayers of the state. With respect to the admission fee, so to speak, which the foreign corporation must pay to become a *quasi* citizen of the state and entitled to equal privileges with citizens of the state, the measure of the burden is in the discretion of the state and any inequality as between the foreign corporation and the domestic corporation in that regard does not come within the inhibition of the 14th amendment; *but after its admission, the foreign corporation stands equal and is to be classified with domestic corporations of the same kind.*" (Our italics.)

In view of these recognized limitations upon the right of the states, petitioner asks: "*What* are the real and substantial differences pertinent to the subject in respect of which the classication is made in this case?" The subject of the particular legislation clearly is limiting the time within which actions must

be commenced upon policies of insurance. Pertinent differences must, therefore, necessarily be discovered affecting the commencement of such actions. The opinion of the Circuit Court of Appeals makes no attempt to answer this question. The court says that the difference between a foreign insurance corporation and a domestic one is certainly substantial, but surely if this is true, it is equally true of a foreign and domestic manufacturing company, or a foreign and domestic merchandising company. The fact that one is foreign and one is domestic alone cannot be sufficient under the decisions of this court to justify the classification. The Circuit Court of Appeals concludes its opinion as follows:

> "* * * We cannot say that when the legislation provided one set of regulations to control domestic insurance companies and another to control foreign insurance companies, the latter provisions applying uniformly to all corporations, within the class, was arbitrary; but, upon the contrary, it was based on a real and substantial difference, having a reasonable relation to the subject of the particular legislation. *Power Mfg. Co. v. Saunders*, 274 U. S. 490."

It is submitted that this statement has no factual foundation. There is nothing about the nature of a foreign corporation admitted to do business in a state that requires a different treatment from domestic corporations or individuals with reference to the right to limit by contract the time for commencement of actions. This court knows judicially the applicable characteristics of foreign corporations and the Indiana statutes with reference to the commencement of actions. There is but one Indiana statute providing

for the commencement of civil actions, Sect. 2-802 Burns' Indiana Stat. 1933 (Acts 1881, Special Session, Ch. 38, Sec. 55, p. 240), which is as follows:

> "2-802. (332). Filing complaint—Summons.—A civil action shall be commenced by filing in the office of the clerk a complaint, and causing a summons to issue thereon; and the action shall be deemed to be commenced from the time of issuing the summons; but as to those against whom publication is made, from the time of the first publication. The summons shall be issued by the clerk, under the seal of the court and directed to the sheriff, and shall notify the defendant of the action commenced, the parties thereto, and the court where pending."

Under this statute suit is deemed commenced when process is issued and delivered to the proper officer for service.

> *Marshall v. Matson*, 171 Ind. 238, 244;
> *Moore-Mansfield etc. Co. v. Indianapolis etc. R. Co.*, 179 Ind. 356, 361.

The actual service is not necessary to commencement. However, there is set out in the appendix hereto the various Indiana statutes relating to service of process upon foreign corporations demonstrating that such service has been adequately provided for. Under these statutes, it is no more difficult to commence an action against a foreign corporation than against a domestic corporation. Precisely the same method is followed in either case. Why, then, should a foreign corporation be denied the right to limit the time for commencing action to a period of fifteen

months when a competing Indiana corporation has the undoubted right to do so?

Caywood v. Supreme Lodge etc., 171 Ind. 410.

No facts of which the court does not have judicial knowledge could conceivably be material to a determination of the question. The case is one where no reasonable basis for the classification can be discovered.

Liggett Co. v. Lee, 288 U. S. 517, 533.

THE RIGHT DENIED IS ONE OF SUBSTANCE AND IMPORTANCE.

The right of insurance companies to impose reasonable contractual limitations is a substantial right, supported by a policy which this court has recognized as sound.

Riddlesbarger v. Hartford Ins. Co., 74 U. S. 386;
Hartford Accident & Indemnity Company, et al. v. Delta & Pine Land Co. (U. S. Sup. Ct. April 9, 1934).

It is just as important to foreign insurance corporations doing business in Indiana as to like Indiana corporations that the extent of losses sustained by them shall be speedily ascertained, and that in case of controversy upon a loss, resort shall be had by the assured to the proper tribunal while the transaction is recent and the proofs respecting it are accessible. The place of commencement of the action is merely procedural. The question of the right of contract involved here is substantive.

Moreover, competing foreign and domestic insurance companies are placed on a different basis with

reference to the length of time they must maintain reserves to cover possible losses. The discrimination is not merely theoretical, but real. Whether the petitioner has suffered in this particular case by the failure to comply with its contract is immaterial. The fact remains that it has the right to stand upon its contract in so far as the provisions thereof are not destroyed by valid state legislation. The principle involved is of widespread importance to insurance companies engaged in business throughout the United States.

Opinion of the Circuit Court of Appeals.

The Circuit Court of Appeals in this case has at least suggested the application of other principles which are contrary to decisions of this court. We refer especially to the following language:

> "The statute in question having been enacted before the 14th amendment, and having remained a part of the public policy of Indiana until now, it cannot even be suggested that the legislature had any design upon nullification of the 14th Amendment, but was attempting to establish a public policy for the State."

That state statutes, state public policy, and even state constitutions yield if in conflict with subsequently ratified amendments to the Constitution of the United States, is so fundamental that it is scarcely conceivable that the Circuit Court of Appeals intended to suggest the contrary. In both *Neal v. Delaware*, 103 U. S. 370, and *Ex parte Yarbrough*, 110 U. S. 651, the principle is stated with reference to the effect upon provisions of state constitutions. Also, the intention with which a legislature enacts a statute can play no

part in determining its validity. If within the power of the state, the motive cannot vitiate it, and, conversely, if the statute does in fact deny the equal protection of the laws, no legislative intent or lack of intent to violate the 14th Amendment can be material. In *Doyle v. Continental Insurance Company*, 94 U.S. 535, this court states that, "if the state has the power to do an act, its intention or the reason by which it is influenced in doing it cannot be inquired into." The converse necessarily is true.

The language quoted by the Circuit Court of Appeals from *Paul v. Virginia*, 75 U. S. 168, cannot apply to the question involved here. The petitioner is seeking to establish no peculiar privilege conferred on it by the laws of New York or any other state, but the privilege of contracting on the same terms as Indiana insurance companies, which it is denied by the statute in question.

Indiana Decisions Not in Point.

It is true, as stated by the Circuit Court of Appeals, that the validity of the statute has been sustained in one Indiana decision, (*Insurance Company of North America v. Brim* (1887), 111 Ind. 281, 287, 288), and assumed in later Indiana decisions. Aside from the fact that these cases are in no way controlling, they are not even persuasive because they involve no consideration of the question of discrimination. At the time the *Brim* case was decided, this court took a different view of the effect of the right to exclude foreign corporations, as including the right to admit them subject to discriminatory conditions. In *Terral v.*

Burke Construction Co., 257 U. S. 529, and subsequent decisions, the older views were overruled. While there are numerous decisions recognizing the power of the state to limit the contractual rights of insurance companies as to limitation periods, there are none except this cause involving the question of a restriction in this respect imposed upon foreign insurance companies alone.

It is submitted that this petition presents a subject matter which should be determined by a decision of this court.

Respectfully submitted,

JAMES W. NOEL,
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Of Counsel.

APPENDIX.

The following Indiana statutes pertain to service of process upon foreign insurance companies:

Par. (f) of Section 334, Burns' Indiana Annotated Statutes, 1929 Supp. (Acts 1929, page 806):

> "(f) Process upon a foreign corporation authorized to do business in this state may be served upon its agent in this state appointed to receive service.
>
> "Provided, however, That if the persons mentioned in subsections (a), (b), (c) and (f)* hereunder can not be found for service, process may be served upon the secretary of state of the State of Indiana, and such secretary of state shall mail such process to the post-office address of the corporation as shown on its last annual report to the secretary of state, and such service shall be sufficient to give the court of issue jurisdiction of the corporation party."
>
> * In general, these sub-sections cover presidents, presiding officers, chairman of the Board of Directors, secretary, treasurer or resident agent.

Section 9133, Burns' Ann. Stat. 1926 (Acts 1883, page 116):

> "9133. (4795) Service of Process.—1. It shall not be lawful for any insurance company chartered, organized, or incorporated in any other state or nation to do business in the State of Indiana until such company shall file with the auditor of state a certified copy of a vote or resolution of the board of directors of such company consenting that service of process in any suit against such company may be served upon

any authorized agent of such company in the State of Indiana, with like effect as if such company was chartered, organized or incorporated in the State of Indiana, and agreeing that any process served upon such agent shall be of the same legal force and validity as if served upon said company, and agreeing that such service may be so made, with such effect, while any liability remains outstanding against such company of this state, and agreeing further, that if at any time there shall be no authorized agent of such company in the county where any suit shall be brought, service may thereafter be made upon the auditor of state of the State of Indiana with such effect as if made upon an authorized agent of such company."

Section 9134, Burns' Ann. Stat. 1926 (Acts 1883, page 116):

"9134. (4796) Service by duplicate.—2. Service of process in any action against any insurance company not having an agent in that county where any suit shall be brought shall be made upon the auditor of state by duplicate copy, and such service shall be deemed in all respects the same as if such company was chartered, organized or incorporated in the State of Indiana: Provided, however, That a writ against the auditor of state, in such case, shall not be returnable until thirty days after service. It shall be the duty of the auditor of state, upon such service, to promptly send one copy of such summons by registered letter to the president of such company, at the home office of the company, or if such company shall be chartered, organized or incorporated in a foreign country and shall have a principal office in the United States, the auditor shall send such copy to such principal office in the United States. The audi-

tor shall file the other copy of summons in his office."

Section 9136, Burns' Ann. Stat. 1929 Supp. (Acts 1927, page 512):

> "9136. Subject to process in legal proceeding by citizen.—1. Every insurance company and corporation not incorporated by or organized under the laws of the State of Indiana, and now or hereafter doing business in the State, shall be subject to the process of the courts of this state, in any action, suit or other legal proceeding, relatiig to or founded upon any claim or demand of any character whatsoever, held or asserted against said company or corporation, by any citizen of the State of Indiana, and process against such company or corporation shall be served in the manner as now provided by existing laws: Provided, That this act shall not apply to nor affect any pending litigation."

Under Section 9162, Burns' Ann. Stat. 1926 (Acts 1919, page 109), all duties of the auditor of state with reference to insurance companies are transferred to the Insurance Commissioner.

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SUMMARY OF ARGUMENT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK,
Petitioner,
v.
KENNETH V. BROWNELL, AS RECEIVER OF THE PEOPLES NATIONAL BANK AND TRUST COMPANY,
Respondent.

No. 962.

BRIEF OF RESPONDENT.

ARGUMENT.

I.

The only question presented for the consideration of this Court is whether the provisions of Burns' Indiana Revised Statutes, 1926, Sec. 9139 (Acts 1865, p. 105), which provides in part that:

> "No condition or agreement not to sue for a period of less than three years shall be valid, * * *"

is a valid restriction upon all foreign insurance companies admitted to transact business in the State of Indiana.

It is the position of respondent that under this statute the provision in the fidelity bond issued by petitioner limiting the time within which suit could be brought thereunder to fifteen months is invalid, and that the action filed thirty-three months after loss was discovered could be maintained.

The Statute of Limitations of Indiana covering the bringing of actions on written contracts for the payment of money, which was enacted in 1881, being Burns' Indiana Revised Statutes, 1926, Sec. 302, provides in part as follows:

> "The following actions shall be commenced within the periods herein prescribed after the cause of action has accrued and not afterward:
>
> * * * * * *
>
> "Fifth: Upon promissory notes, bills of exchange, and all other written contracts for the payment of money hereafter executed, within ten years: * * *"

1. The rules of law governing the construction of and the right to recover under insurance contracts measures the rights under fidelity bonds executed for a money consideration.

> *American Surety Co. v. Pangburn*, 182 Ind. 116, 119;
> *Fidelity, etc., Co. v. Blount Plow Works*, 78 Ind. App. 529, 533;
> *National Surety Co. v. Rochester Bridge Co.*, 83 Ind. 195, 198;

Title Guaranty, etc., Co. v. State ex rel., 61 Ind. App. 268, 280.

2. Conditions in policies of insurance that actions must be brought thereon in less than three years are void.

Insurance Co. v. Brim, 111 Ind. 281, 287;
Caywood v. Supreme Lodge, 171 Ind. 410, 412;
New York Life Ins. Co. v. Lahr, 192 Ind. 613, 631;
Rutherford v. Prudential Ins. Co., 34 Ind. App. 531, 539;
Phoenix A. & S. B. Assn. v. Lathrop, 41 Ind. App. 141, 145.

In the foregoing cases this statute has been applied and in each instance the upper courts of Indiana have declared that a provision in an insurance policy limiting the time for bringing suit to less than three years is void. The leading case is the first cited, *Insurance Co. v. Brim*, 111 Ind. 281. On page 287, in commenting on the validity of this statute, the Indiana Supreme Court said:

> "The statute already referred to enacts that any condition or agreement in a policy of foreign insurance, 'not to sue for a period of less than three years,' shall be void, and it also provides that any condition inserted in a policy to avoid the provisions of that section shall be void. It is at once obvious that the condition in the policy and the provisions of the statute can not stand together. It is said the provision in the policy, the practical effect of which was to bar a right of action after one year, was such a contract as the parties had the right to make,

and that such right was not subject to legislative control.

"While the general proposition may be conceded, that insurance companies have the right to contract that parties shall assert their claims against them within a reasonable time (*Riddlesbarger v. Hartford Ins. Co.*, 7 Wall. 386), yet the constitutional right of the Legislature to prescribe the terms upon which foreign corporations may transact business within the State is also abundantly established. *Farmers, etc., Ins. Co. v. Harrah*, 47 Ind. 236; *Bank of Augusta v. Earle*, 13 Pet. 519; *Paul v. Virginia*, 8 Wall. 168; *Ducat v. Chicago*, 10 Wall. 410; *Cooper Man'f'g Co. v. Ferguson*, 113 U. S. 727; *Cincinnati Mutual, etc., Co. v. Rosenthal*, 55 Ill. 85; *Thorne v. Travellers Ins. Co.*, 80 Pa. St. 15.

"The statute must be regarded as a legislative declaration, that less than three years is an unreasonable limit within which to require parties holding claims under a policy of foreign insurance to assert their claims or be forever barred. This statute was in force when the contract of insurance was consummated, and it must be conclusively presumed that the contract was made with a due regard for the law. In so far as the statute and the condition in the policy are in conflict, the statute must prevail. It is said the statute is unconstitutional. Counsel have not called our attention to any provision of the Constitution which is supposed to be infringed, and we know of none."

In addition thereto, in the case of *Rutherford v. Prudential Ins. Co.*, 34 Ind. App. 531, 539, the Court said:

"The condition that 'no suit on this policy shall be maintained against the company unless

> brought within six months next after the date of the death of the insured' is in conflict with the provisions of the statute that 'no condition or agreement not to sue for a period of less than three years shall be valid.' "

In *Phoenix Accident, etc., Assn. v. Lathrop*, 41 Ind. App. 141, 145, the Court said:

> "The second paragraph of answer set up that the cause of action did not accrue within six months preceding the action. There was a clause in the policy thus limiting the right to sue. Such limitation is void."

In *New York Life Ins. Co. v. Lahr*, 192 Ind. 613, 631, the Court said:

> "The provision in the policy that no suit shall be brought on the policy after one year from the time of the accruing of the cause of action is void under the statute."

In *Caywood v. Supreme Lodge*, 171 Ind. 410, 412, the Court said:

> "It is settled by the great weight of authorities that a provision in an insurance policy limiting the time in which suit may be brought thereon to a period less than that fixed by statute of limitations is binding, unless it contravenes a statute."

While the Indiana decisions are not controlling in the United States Courts, in the event the statute actually contravenes the Constitution of the United States, the foregoing decisions do show that this statute has been applied and has been upheld for many years in Indiana. The decision of the Circuit Court

of Appeals in affirming the judgment of the Court below is not in conflict with the weight of authority nor with the decisions of this Court.

II.

Indiana is not alone in having enacted legislation of this nature. Numerous other states have similar statutes in force, the validity of which have been upheld in the following cases:

Erickson v. Order of United Commercial Travelers, (Kan.) 176 Pac. 989;

Cortessi v. Firemen's Fund Ins. Co., 5 Ohio App. 109;

Schlitz v. Lowell Mut. Fire Ins. Co., (Vt.) 119 Atl. 516;

Stuyvesant Ins. Co. v. A. C. Smith Co., (Miss.) 99 So. 575;

Galliher v. State, etc., Ins. Co., (Ala.) 43 So. 833;

Smith & Marsh v. Northern, etc., Fire Assn., (Va.) 70 S. E. 482, 38 L. R. A. (N. S.) 1016;

Massachusetts Benefit Life Assn. v. Hale, (Ga.) 23 S. E. 845;

Vesey v. Commercial Union, etc., Co., (S. D.) 101 N. W. 1074;

German Ins. Co. v. Luckett, Texas Civil Appeals, 34 S. W. 173.

III.

The State of Indiana had the power to determine and specify the conditions under which foreign insurance companies should be permitted to transact busi-

ness within its borders. It had the power to exclude petitioner from doing business within the state, and to determine under what conditions it could transact business and execute contracts, provided that it did not deprive such a corporation of rights conferred by the Constitution and laws of the United States.

Phoenix Ins. Co. v. McMaster, 237 U. S. 63, 71;
Security Mutual v. Prewitt, 202 U. S. 246;
St. Clair v. Cox, 106 U. S. 350;
Munday v. Wisconsin Trust Co., 252 U. S. 499;
Paul v. Virginia, 8 Wall. 168, 181.

In discussing this question in the case last above cited, Mr. Justice Fields said, at page 181:

> "Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows as a matter of course that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities; or they may exact such security for the performance of its contract with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion."

Also in the case of *Phoenix Ins. Co. v. McMaster*, 237 U. S. 63, 71, Mr. Justice Day said:

> "Furthermore, the Phoenix Company is a foreign corporation whose license to do business in the State of South Carolina would expire

upon the first of April, 1912, and, therefore, it was within the power of the State, so long as it did not impose upon the Company as a condition of doing business within the State any deprivation of rights secured to it under the Federal Constitution, to determine for itself the conditions upon which such foreign corporation could do business within the State. This principle has been often affirmed by the decisions of this Court, and the Insurance Company being within that class of companies not doing an interstate business, *the State might, in the exercise of its lawful authority, exclude it from doing business within the State so long as no rights conferred by the Constitution and laws of the United States were destroyed or abridged.* See *Harrison v. St. Louis & San Francisco R. R.*, 232 U. S. 318, 332, and the cases in this Court therein cited." (Our italics.)

The State of Indiana, therefore, clearly had the right to regulate and control the manner in which petitioner transacted business in the state. It is to be noted that no contention is made that petitioner was discriminated against to its detriment in favor of other foreign insurance companies. In fact the statute involved herein applied alike to all such companies.

IV.

Petitioner has not been deprived of equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States, nor has it been deprived of any rights guaranteed under said Constitution nor under any law of the United States.

As has frequently been defined by this Court, equal protection of the laws means subjection to equal laws

applying alike to all in the same situation. It has been always held that states have the right to classify the subjects of legislation and make differences in regulations where substantial differences of condition exist.

Phoenix Ins. Co. v. McMaster, 237 U. S. 63, 67;
Fort Smith Light Co. v. The Paving District, 274 U. S. 387, 391;
Power Mfg. Co. v. Saunders, 274 U. S. 490, 493;
Truax v. Corrigan, 257 U. S. 312, 337;
Gulf, etc., Ry. Co. v. Ellis, 165 U. S. 150, 155;
Lindsley v. Natl. Carbonic Gas Co., 220 U. S. 61, 78.

The petitioner failed to point out to the trial court or to the Circuit Court of Appeals wherein its situation was not substantially different from that of a domestic corporation organized under the laws of the State of Indiana. It merely asked the Court, without any foundation of law or fact, to hold that there was not a substantial difference, and that by reason of such fact the Indiana statute should be declared void. This statute was enacted in 1865, by the General Assembly of the State of Indiana, pursuant to its power to classify and prescribe the different conditions under which foreign insurance companies can transact business. For approximately sixty-seven years before the filing of this action, every foreign insurance company has conducted its business in said state under the provisions of this statute.

Regulatory statutes are not discriminatory when all within a given class are treated on the same basis.

Whether such regulations require adjustment or modification because of changed conditions lies within the province of the law-making bodies and not the courts.

In the case of *Phoenix Ins. Co. v. McMaster*, 237 U. S. 63, 72, in discussing this subject Mr. Justice Day said:

> "The equal protection of the laws, as this court has frequently decided, means subjection to equal laws applying alike to all in the same situation; or as expressed by Mr. Justice Field, speaking for this court in *Barbier v. Connolly*, 113 U. S. 27, 31,—a case much relied upon by the plaintiffs in error,—equal protection of laws means 'that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances, in the enjoyment of their personal and civil rights. . . . That no greater burdens should be laid upon any one than are laid upon others in the same calling and condition.' In this general definition, the court recognizes, as it always has, that what the equal protection of the law requires is equality of burdens upon those in like situation or condition. It has always been held consistent with this general requirement to permit the States to classify the subjects of legislation, and make differences of regulation where substantial differences of condition exist."

In the light of the foregoing rule, the Statute under consideration clearly is not discriminatory.

V.

The restrictions imposed by this statute are not in any way in interference with interstate commerce, as the issuance of the policy of insurance is not a trans-

action of commerce, nor is an insurance contract an article of commerce, but merely a contract of indemnity.

Paul v. Virginia, 8 Wall. 168, 183;
New York Life Ins. Co. v. Deer Lodge County, 231 U. S. 495, 502;
Natl., etc., Ins. Co. v. Wanberg, 260 U. S. 71, 75;
Hooper v. California, 155 U. S. 648.

VI.

The classification made by the General Assembly of Indiana in passing this statute is not open to objection, as it does not preclude the assumption that such classification was made in the exercise of legislative judgment and discretion. It cannot be said that in enacting said statute the Legislature failed to exercise its judgment and discretion within proper bounds.

Stebbins v. Riley, 268 U. S. 137, 143;
Swiss Oil Corp. v. Shanks, 273 U. S. 407, 413.

Petitioner complains of the opinion of the Circuit Court of Appeals on the ground that the Court failed to point out wherein this statute was not a discrimination or wherein a substantial difference existed. It would seem rather that the burden was upon petitioner to show wherein there was a discrimination and that a substantial difference did not exist. This it wholly failed to do. No evidence was introduced in the lower court to prove such fact, nor was anything presented to justify petitioner's position.

The Legislature well might have considered the differences in the transaction of business with foreign

and domestic insurance companies. It may have considered the necessity of communicating with officials and officers outside of the state in the settlement of claims, and may have felt that in order to protect the rights of the citizens of Indiana a claimant should have at least three years within which to bring an action under an insurance contract. Such consideration would be most reasonable and proper.

While it is not involved in this case, there is a statute in force in the State of Indiana, being Burns' Indiana Revised Statutes, 1926, Sec. 9037, which imposes the same condition on policies issued by domestic life insurance companies. This statute is mentioned merely for the purpose of showing that the Legislature did have some valid and good reason for this limitation. The mere fact that all companies which might be regulated in a similar manner were not included does not render invalid regulation of all those in the same class.

VII.

No facts are disclosed by the record which would justify the Court in holding that the action of the Indiana General Assembly was arbitrary or unreasonable. In the absence of such showing the Court would not be justified in overruling the decisions of the Supreme and Appellate Courts of that state.

Fort Smith Light Co. v. The Paving District, 274 U. S. 387, 391;

Public Service Co. v. Durham, 261 U. S. 149, 154;

Middleton v. Texas Power & Light Co., 249 U. S. 152, 158;

Swiss Oil Corp. v. Shanks, 273 U. S. 407;
Erb v. Morasch, 177 U. S. 584, 586.

In a number of decisions this Court has refused to assume that substantial differences in condition do not exist in the absence of proof of such fact. Before petitioner is entitled to judgment that the regulation complained of was not based on a valid distinction it had the burden of showing that such distinction did not exist and that because thereof the statute was arbitrary or unreasonable.

This proposition was discussed in the case of *Fort Smith Light Co. v. The Paving District*, 274 U. S. 387. On page 391 Mr. Justice Stone said:

> "Nor need we cite authority for the proposition that the Fourteenth Amendment does not require the uniform application of legislation to objects that are different, where those differences may be made the rational basis of legislative discrimination. There is nothing in the record now before us to show that there is any similarity of plaintiff's road to others in the state with respect to many considerations which might reasonably determine which roads should be required to do street paving. Differences in location, use and physical character of the streets, the extent to which paving has been completed and local methods of assessing benefits for street paving, are some of the considerations which might reasonably move the legislature to require street paving of one road or several and not of others. Cf. *Metropolitan Street Ry. v. New York*, 199 U. S. 1, 46, 47; *N. Y., N. H. & H. R. R. v. New York*, 165 U. S. 628; *Erb v. Morasch*, 177 U. S. 584, 586; *Savannah, Thunderbolt Ry. v. Savannah*, 198 U. S. 392. We may not assume in the absence of proof that

such differences do not exist. *Erb v. Morasch, supra; Middleton v. Texas Power & Light Co.*, 249 U. S. 152, 158; *Swiss Oil Corp. v. Shanks*, 273 U. S. 407.

"There are no facts disclosed by the record which would enable us to say that the legislative action with which we are here concerned was necessarily arbitrary or unreasonable or justify us in overruling the judgment of the state court that it was reasonable. *Public Service Co. v. Durham, supra*, 154."

In the case of *Middleton v. Texas Power & Light Co.*, 249 U. S. 152, this Court had under consideration the Texas Workmen's Compensation Act, which exempted certain classes of employees from its scope. The contention was made that by reason of this fact the act was discriminatory. In discussing the question as to how courts should approach the question of determining whether or not a statute is unconstitutional, this Court said, on page 157:

"There is a strong presumption that a legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience, and that its discriminations are based upon adequate grounds. The equal protection clause does not require that state laws shall cover the entire field or proper legislation in a single enactment. If one entertained the view that the act might as well have been extended to other classes of employment, this would not amount to a constitutional objection. (Citing cases.)

"The burden being upon him who attacks a law for unconstitutionality, the courts need not be ingenious in searching for grounds of dis-

> tinction to sustain a classification that may be subjected to criticism."

In the case of *Erb v. Morasch*, 177 U. S. 584, this Court considered the validity of an ordinance enacted in Kansas City, Kansas, regulating the operation of street railroads. One of such railroads was excepted from its provisions. The claim was made that because of such fact the ordinance was unconstitutional. In discussing its duty in construing this ordinance in the absence of any proof this Court said, on page 586:

> "With the presumption always in favor of the validity of legislation, state or municipal, if the ordinance stood by itself the courts would be compelled to presume that different circumstances surrounding the tracks of respective railroads were such as to justify a different rule in respect to the speed of their trains."

In that case, however, evidence was introduced and it was shown that the railway was properly excepted from the provisions of the ordinance.

CONCLUSION.

The petitioner throughout the course of this litigation has based its case principally on *Power Mfg. Co. v. Saunders*, 274 U. S. 490, wherein this Court held an Arkansas statute invalid. The facts in that case were entirely different from those in this action, in that the right to file transitory actions against foreign companies in any county in the state as against the right to file actions against domestic corporations in the county wherein it had an agent or place of business was involved. In that case the general rule was stated by Mr. Justice VanDevanter, on page 39;

> "It (the Fourteenth Amendment) does not prevent a state from adjusting its legislation to differences in situation or forbid classification in that connection; but it does require that the classification be not arbitrary, but based on a real and substantial difference having a reasonable relation to the subject of the particular legislation."

The Legislature of Indiana has indicated, by enacting the statute involved herein, that there is a substantial difference between domestic and foreign insurance companies. In this action this statute stands alone. Later a statute was enacted providing that a clause in an insurance policy issued by a domestic company limiting the right to bring an action within three years is void. Such act clearly indicates that in the opinion of the Legislature the welfare of the people of this state demanded that the time for bring an action be not limited to less than three years. Such a regulation certainly cannot be classified as arbitrary and not founded on sound judgment.

There has been no showing that petitioner was in any way harmed by the statute, that by reason thereof was in any wise precluded from making a proper defense to this action, or that the so-called discrimination deprived it of the equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States.

In petitioner's brief is quoted certain language of the Circuit Court of Appeals stating that it evidently was not the intention of the Legislature when the act was passed to nullify the Fourteenth Amendment for the reason that such amendment was not in effect. The opinion further states that it was evident that the Legislature was attempting to establish a public policy for the State of Indiana. These observations in no wise affect the soundness of the opinion, as this Court will readily see, and are not subject to criticism on the part of petitioner.

The petitioner has failed to show wherein the Circuit Court of Appeals has decided an important question of local law in conflict with local decisions, or has failed to point out any important question of Federal law which should be decided by this Court.

In view of all the foregoing the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

SIDNEY S. MILLER,
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Attorneys for Respondent.

SAMUEL D. MILLER,
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Of Counsel.

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CHARLES ELMORE CROPLEY

No. 20.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934.

THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK,
Petitioner,

v.

KENNETH V. BROWNELL, AS RECEIVER OF THE PEOPLES NATIONAL BANK AND TRUST COMPANY,
Respondent.

PETITION OF THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK FOR REHEARING WITH BRIEF IN SUPPORT THEREOF.

JAMES W. NOEL,
ALAN W. BOYD,
Counsel for Petitioner.

HUBERT HICKAM,
ROBERT D. ARMSTRONG,
Of Counsel.

E. A. HARDIN PRINT, INDIANAPOLIS, INDIANA

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934.

THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK, *Petitioner*, *v.* KENNETH V. BROWNELL, AS RECEIVER OF THE PEOPLES NATIONAL BANK AND TRUST COMPANY, *Respondent.*	No. 20.

PETITION OF THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK FOR REHEARING.

Your petitioner, The Metropolitan Casualty Insurance Company of New York, respectfully presents this its petition for rehearing in the above-entitled cause, and respectfully submits that it has been aggrieved by the opinion and judgment of your Honors rendered herein on the 18th day of March, 1935, in the several respects hereinafter set forth:

1. The court erred in affirming the judgment of the Circuit Court of Appeals for the Seventh Circuit in the above-entitled cause.

2. The court erred in holding that the demurrer of the defendant (your petitioner) to the complaint of the plaintiff (the respondent) was properly overruled by the District Court.

3. The court erred in holding that the demurrer of the plaintiff (the respondent) to the answer of the defendant (your petitioner) was properly sustained by the District Court.

4. The court erred in holding, in effect, that a statute should be sustained, which is challenged as unconstitutional under the Equal Protection Clause of the Fourteenth Amendment, and upon the face of which no reasonable basis for the classification is apparent.

5. The court erred in holding, in effect, that where a statute is challenged as unconstitutional under the Equal Protection Clause of the Fourteenth Amendment, it is necessary for the challenging party to allege and prove facts which will not only negative all conceivable bases for the classification, but, in addition, will negative bases of which the court does not and cannot conceive.

6. The court erred in holding that there can be any conceivable difference between a foreign insurance company doing business in the State of Indiana and a domestic insurance company of said state, which has any reasonable relation to the classification in question. (Section 9139, Burns' Ann. Stat. 1926, Acts of Indiana, 1865, p. 105.)

7. The court erred in holding that the provision of your petitioner's bond requiring the commencement of an action within fifteen months after the presentation of a claim is rendered invalid by Section 9139, Burns' Ann. Stat. 1926 (Acts of Indiana, 1865, p. 105).

8. The court erred in holding that Section 9139, Burns' Ann. Stat. 1926 (Acts of Indiana, 1865, p. 105), as construed by the Supreme Court of Indiana, is a valid legislative enactment.

9. The court erred in holding that Section 9139, Burns' Ann. Stat. 1926 (Acts of Indiana, 1865, p. 105), does not deny to appellant the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

And your petitioner submits, files herewith, and makes a part hereof, its brief in support of this petition, which it prays your Honors to consider in passing hereon.

WHEREFORE, your petitioner prays your Honors for a rehearing of said cause, and that the judgment of the Circuit Court of Appeals for the Seventh Circuit be in all things reversed, and for all other proper relief.

JAMES W. NOEL,
ALAN W. BOYD,
Counsel for Petitioner.

CERTIFICATE.

We hereby certify that we are counsel of record in the above-entitled cause for The Metropolitan Casualty Insurance Company of New York; that we have prepared and read the above and foregoing petition for rehearing, and the brief in support of said petition referred to therein, and made a part thereof; and that said petition is presented in good faith and not for delay.

JAMES W. NOEL,
ALAN W. BOYD,

Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934.

THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK,
Petitioner,
v.
KENNETH V. BROWNELL, AS RECEIVER OF THE PEOPLES NATIONAL BANK AND TRUST COMPANY,
Respondent.
No. 20.

BRIEF OF THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK IN SUPPORT OF ITS PETITION FOR REHEARING.

The petition for rehearing, filed separately, is as follows (omitting formal parts):

THE PETITION FOR REHEARING.

Your petitioner, The Metropolitan Casualty Insurance Company of New York, respectfully presents this its petition for rehearing in the above-entitled cause, and respectfully submits that it has been aggrieved

by the opinion and judgment of your Honors rendered herein on the 18th day of March, 1935, in the several respects hereinafter set forth:

1. The court erred in affirming the judgment of the Circuit Court of Appeals for the Seventh Circuit in the above-entitled cause.

2. The court erred in holding that the demurrer of the defendant (your petitioner) to the complaint of the plaintiff (the respondent) was properly overruled by the District Court.

3. The court erred in holding that the demurrer of the plaintiff (the respondent) to the answer of the defendant (your petitioner) was properly sustained by the District Court.

4. The court erred in holding, in effect, that a statute should be sustained, which is challenged as unconstitutional under the Equal Protection Clause of the Fourteenth Amendment, and upon the face of which no reasonable basis for the classification is apparent.

5. The court erred in holding, in effect, that where a statute is challenged as unconstitutional under the Equal Protection Clause of the Fourteenth Amendment, it is necessary for the challenging party to allege and prove facts which will not only negative all conceivable bases for the classification, but, in addition, will negative bases of which the court does not and cannot conceive.

6. The court erred in holding that there can be any conceivable difference between a foreign insurance company doing business in the State of Indiana

and a domestic insurance company of said state, which has any reasonable relation to the classification in question. (Section 9139, Burns' Ann. Stat. 1926, Acts of Indiana, 1865, p. 105.)

7. The court erred in holding that the provision of your petitioner's bond requiring the commencement of an action within fifteen months after the presentation of a claim is rendered invalid by Section 9139, Burns' Ann. Stat. 1926 (Acts of Indiana, 1865, p. 105).

8. The court erred in holding that Section 9139, Burns' Ann. Stat. 1926 (Acts of Indiana, 1865, p. 105), as construed by the Supreme Court of Indiana, is a valid legislative enactment.

9. The court erred in holding that Section 9139, Burns' Ann. Stat. 1926 (Acts of Indiana, 1865, p. 105), does not deny to appellant the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

And your petitioner submits, files herewith, and makes a part hereof, its brief in support of this petition, which it prays your Honors to consider in passing hereon.

WHEREFORE, your petitioner prays your Honors for a rehearing of said cause, and that the judgment of the Circuit Court of Appeals for the Seventh Circuit be in all things reversed, and for all other proper relief.

PETITIONER'S REASONS FOR REHEARING.

The petitioner earnestly urges the court to reconsider its opinion in this cause. Our reasons will be very briefly stated.

At the outset, we assume that the language used on page 3 of the official report of the court's opinion in this case was not intended to convey the impression that if there were a reasonable basis for the classification embodied in the challenged statute in 1865 when it was enacted, the statute should be upheld even though there is no such basis now. Certainly that would not be the law, as this court, speaking through Mr. Justice Brandeis, very recently declared in *Nashville etc. R. Co. v. Walters* (No. 183, decided March 4, 1935; see 79 Lawyers' Edition Advance Opinions, No. 9, page 458, 461). In that case, this court expressly said:

> "A rule to the contrary is settled by the decisions of this court. * * *. A statute valid when enacted may become invalid by change in the conditions to which it is appled."

We think that the court correctly stated the general principles applicable when it said:

> "The ultimate test of validity is not whether foreign corporations differ from domestic, but whether the differences between them are pertinent to the subject with respect to which the classification is made. *Power Mfg. Co. v. Saunders, supra*, 494. If those differences have any rational relationship to the legislative command, the discrimination is not forbidden. *Bond & Goodwin & Tucker, Inc. v. Superior Court*, 289 U. S. 361, 366; *National Union Fire Insurance*

Co. v. Wanberg, 260 U. S. 71, 75. See *Clarke v. Deckebach*, 274 U. S. 392, 396."

It is in the application of these principles that we feel the court has fallen into error. We particularly wish to call the court's attention to two distinct and independent grounds:

(1) The court's opinion seems to hold that, in order to establish the unconstitutionality of a statute, the challenging party must allege and prove facts which will not only negative all conceivable bases for the classification, but in addition will negative bases of which the court does not and cannot conceive. We submit that such holding is contrary to the previous doctrine of this court, and also that it is unsound.

(2) As a matter of practice, even upon the doctrine of this court's opinion in this case, the demurrer to the defendant's answer should have been overruled, and the defendant permitted to make a case of unconstitutionality upon the proof.

Of these in their order.

THE BASIS FOR THE CLASSIFICATION MUST APPEAR IN THE STATUTE EXAMINED BY THE COURT IN THE LIGHT OF ITS JUDICIAL KNOWLEDGE.

As we understand the court's opinion, the court does not say that there is any basis for the classification here assailed, or that it does, or can, conceive of any basis for the classification. We understand the court to hold, in effect, that the challenging party must demonstrate that there is no conceivable basis there-

for, and further must negative bases of which the court cannot and does not conceive. We think we fairly state the doctrine previously laid down by the court when we say that it has always been considered that to sustain a statute so assailed it must be possible for the court, after taking judicial knowledge of facts of common knowledge, to say that there is a reasonable basis for the classification, and that such basis appears to the court, after taking such judicial knowledge, upon the face of the statute itself.

THE DOCTRINE OF LIGGETT COMPANY V. LEE.

We wish particularly to call attention to the decision of this court in *Liggett Company v. Lee*, 288 U. S. 517, 532-4. That case, like the instant case, arose upon the sufficiency of the pleadings, and not upon the evidence at the trial. The bill of complaint attacked the Florida Chain Store Tax Law, as in violation of the equal protection clause. The plaintiff attempted to distinguish between the Florida law and the Indiana law sustained in *State Board v. Jackson*, 283 U. S. 527, by making numerous allegations of fact, from which it contended that a different conclusion necessarily followed. Mr. Justice Roberts, speaking for the majority, commented on these attempts as follows:

> "In their endeavor thus to distinguish the earlier case, the appellants stress mere details, but ignore the underlying reason for sustaining the classification there attacked. The decision in the Jackson Case was based not upon any single feature of chain store management, but *upon the ultimate fact of common knowledge,*

> *illustrated and emphasized by the evidence*, that the conduct of a chain of stores constitutes a form and method of merchandising quite apart from that adapted to the practice of the ordinary individually operated small store or department store; and that the difference between an integrated and a voluntary chain is fundamental." (Italics ours.)

It will be noted that here the emphasis is altogether on facts of which judicial knowledge is taken, merely "illustrated and emphasized" by the evidence, if any. Under the doctrine of *Liggett Company v. Lee*, facts pleaded or proved could have no other function. They could not be permitted to contradict what the court judicially knows.

In *Liggett Company v. Lee*, this court found the Florida statute unconstitutional on the sole ground that a county line was an unreasonable basis of classification. In passing, we may remark that we think a county line is a basis no less arbitrary than the line between incorporating states, which, under the statute here assailed, determines the time for filing suit. But it is important to note that in *Liggett Company v. Lee*, the court does not refer in its opinion to a single fact alleged in the bill which does not appear upon the face of the statute. In discussing the reasonableness of the classification, the court merely says:

> "* * * but an increase in the levy not only on a new store but on all the old stores, consequent upon the mere physical fact that the new one lies a few feet over a county line, *finds no foundation in reason or in any fact of business experience.* There is no more reason for adopting the county line as a measure of the.

> tax than there would be for taking ward lines in cities, or arbitrary lines drawn through the state regardless of county boundaries." (Italics ours.)

Here the recognized standard is not the facts alleged or proved, but "reason" and "facts of business experience." The court expressly says:

> "* * * *if any reasonable distinction can be found*, the duty of the court is to sustain the classification embodied in the law. * * * *We are unable to discover any reasonable basis for this classification.*" (Italics ours.)

It seems to us that the precise doctrine which the court adopts in the instant case is the doctrine set forth in Mr. Justice Brandeis' dissenting opinion in *Liggett Company v. Lee*, and concurred in by Mr. Justice Stone. The dissenting opinion calls attention to the precise language of the majority opinion just quoted, and disagrees with it. Mr. Justice Brandeis said (288 U. S. 517, 542-3):

> "For the reasons there stated, the Court sustains like provisions in the Florida statute. But it declares arbitrary, and hence invalid, the novel provision imposing heavier license fees where the multiple stores of a single owner are located in more than one county, *because it is 'unable to discover any reasonable basis for this classification.' There is nothing in the record to show affirmatively that the provision may not be a reasonable one in view of conditions prevailing in Florida.* Since the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute, its validity should, in my opinion, be sustained." (Italics ours.)

While the opinion of this court in this case does not purport to overrule the majority opinion in *Liggett Company v. Lee*, we think that it clearly does so, and adopts the doctrine of the dissenting opinion.

THE MAJORITY DECISION IN LIGGETT COMPANY V. LEE STATES THE ESTABLISHED DOCTRINE.

That the majority opinion in *Liggett Company v. Lee* fairly states the doctrine heretofore adhered to by this court is apparent from a brief examination of several other cases. So, in *Power Manufacturing Co. v. Saunders*, 274 U. S. 490, 493-494, which, like this case, arose upon the pleadings and not upon the trial, the court considered the face of the statute together with the facts judicially known, and said:

> "*We think it very plain that the statutes discriminate* against foreign corporations and in favor of domestic corporations. * * * The opinion of the state court *does not point to any relevant distinction nor have counsel suggested any* * * * *it is apparent that there is no more reason for a state-wide venue* when the action is against a foreign corporation than when it is against a domestic corporation or a natural person." (Italics ours.)

Similarly, in *Liggett Company v. Baldridge*, 278 U. S. 105, 111, a statute requiring stockholders in drug store companies to be registered pharmacists was held unconstitutional. The point of view with which the court approached the question is well illustrated in the following language:

> "If detriment to the public health thereby has resulted or is threatened, *some evidence of it ought to be forthcoming. None has been produced, and so far as we are informed, either by the record or outside of it, none exists.* The claim that mere ownership of a drug store by one not a pharmacist bears a reasonable relation to the public health finally rests upon *conjecture unsupported by anything of substance. This is not enough;* and it becomes our duty to declare the act assailed to be unconstitutional as in contravention of the due process clause of the Fourteenth Amendment." (Italics ours.)

Here the court says, in effect, that it can see no basis for the classification, and that if there is any, the party defending the statute ought to point it out.

In *Kentucky Finance Corporation v. Paramount etc. Corporation*, 262 U. S. 544, 551, the court said:

> *"There could be no reason* for requiring a corporate resident of Louisville to send its secretary, papers and files and books to Milwaukee for the purposes of an adverse examination that would not equally apply to an individual resident of Louisville in a like case." (Italics ours.)

In *Quaker City Cab Company v. Pennsylvania*, 277 U. S. 389, 402, the court, after considering the provisions of the statute and taking judicial knowledge of the applicable circumstances, dismissed the classification with this brief comment:

> *"In no view can it be held to have more than an arbitrary basis."* (Italics ours.)

We will not unduly extend this brief by quotations from the decisions of this court which could be multiplied indefinitely.

NEITHER COURT NOR COUNSEL HAVE EVER POINTED OUT ANY POSSIBLE BASIS FOR THE CLASSIFICATION.

Throughout this litigation, it has been quite obvious that it has never been possible for counsel or court to point to any reasonable basis for the classification challenged. Apparently, the General Assembly of the State of Indiana sees none, for at its 1935 session it repealed this statute, and applied the same requirements as to time of bringing suit to both domestic and foreign corporations. (Insurance Code of 1935, Indiana Acts 1935, page ——, not yet published.) In its opinion, the Circuit Court of Appeals indicated that there was one, but made no attempt to point out what it was. In our briefs and upon oral argument before this court, we think we abundantly demonstrated that the suggestion of the Circuit Court of Appeals in this respect is untenable. We challenged counsel to state a single reasonable basis for classification in the mere fact that one insurance company is domestic while the other is foreign. We submit that this challenge was never answered.

The only parts of the opinion of this court which approach the question are the following:

> "We are not told whether, in 1865 when the challenged statute was enacted, or since, differences in the legislative schemes of the state affecting the two classes of casualty insurance companies, foreign and domestic, or differences in their business practices within the state, have or have not made more difficult and time-consuming the collection of claims and the preparations for litigation against foreign in-

surance companies than against domestic companies.

* * *

"There is no showing that the situation of foreign corporations, writing casualty insurance contracts in Indiana, is so similar to that of domestic corporations as to preclude any rational distinction between them as regards the time required for negotiating settlements of claims and the determination whether suits upon them should be prosecuted within or without the state. Where the record is silent, we cannot presume to declare that there is such similarity, or to say that a state is prohibited from making any distinction in the length of time within which suit must be brought. It is not beyond the range of probability that foreign casualty companies, as distinguished from domestic companies, generally keep their funds and maintain their business offices, and their agencies for the settlement of claims, outside the state. For aught that appears such is the actual situation."

PETITIONER HAS AT ALL TIMES CONTENDED THAT THERE IS NO CONCEIVABLE BASIS FOR THE CLASSIFICATION, AND HAS DONE ALL IT CAN TO DEMONSTRATE IT.

May we respectfully call attention to the following language in our brief in support of our petition for the writ of certiorari, which we think correctly summarizes our position both on brief and in oral argument:

> "* * * There is nothing about the nature of a foreign corporation admitted to do business in a state that requires a different treatment from domestic corporations or individuals with reference to the right to limit by contract the time for commencement of actions. This court knows judicially the applicable characteristics of foreign corporations and the Indiana statutes with reference to the commencement of actions. There is but one Indiana statute providing for the commencement of civil actions. * * * Under this statute suit is deemed commenced when process is issued and delivered to the proper officer for service. *Marshall v. Matson*, 171 Ind. 238, 244; *Moore-Mansfield etc. Co. v. Indianapolis etc. R. Co.*, 179 Ind. 356, 361. The actual service is not necessary to commencement." (Brief, page 14. The statutes referred to are quoted at length in the appendix to the brief, at pages 20 to 22, inclusive.)

We respectfully submit that at all times we have argued that the prescribed time for suing domestic insurance companies cannot reasonably differ from the prescribed time for suing foreign companies. We submit, further, that we have said all that we can say (assuming that we are correct) when we say that there is nothing in connection with foreign insurance companies that can justify a different regulation in this respect from that applied to domestic companies.

If, on the other hand, we are wrong in this contention, and there is anything to justify the classification, it must be found in some difference between foreign and domestic corporations, which is inherent in the fact that the former derive their corporate powers from a different state, and which affects the ability of

a plaintiff to legally commence a suit against them. Clearly, under the Indiana statutes and decisions cited there is no such difference. We are unable to conceive of what other facts would have a bearing upon the reasonableness of the classification.

IF THERE COULD BE A BASIS FOR THE CLASSIFICATION, THIS COURT WOULD JUDICIALLY KNOW IT.

But, even if, as the court suggests, something to justify the classification might be found in the legislation of the State of Indiana on other subjects, or in the conditions of the insurance business generally, these would all be facts of which this court can and does take judicial knowledge. If we are correct in our contention that there are no such facts, it is logically impossible for us to point them out. If, on the other hand, we are incorrect in our contention, and such facts do exist, they are matters of judicial knowledge, and opposing counsel and the court itself know them as well as do we.

We think the doctrine of this court in this case loses sight of the wide range of subjects of which this court takes judicial knowledge. This court has many times asserted its power and duty, without evidence and in the face of assertions to the contrary, to take judicial notice of facts of common business experience and knowledge, as well as the provisions of applicable state statutes.

Judicial Knowledge of Business Customs and Practices.

So, as to insurance companies, this court takes judicial knowledge of their customs and manner of doing business; the differences between different kinds of insurance, *Supreme Council v. Behrend* (Brandeis, J.) 247 U. S. 394; and the manner of and basis for determining premium rates, *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389, 406; *Mountain Timber Co. v. Washington*, 243 U. S. 219, 241. As an illustration, in *German Alliance Insurance Co. v. Lewis*, this court said:

> "*Indeed, it is a matter of common knowledge* that rates are fixed and accommodated to those standards and classifications in prearranged schedules, and granted the rates may be varied in particular instances, they are sufficiently definite and applicable as a general and practically constant rule. * * * *Indeed, an allegation in the original bill that the superintendent of insurance could not have the requisite technical and mathematical training* to determine whether a basic rate or an actual rate, as applied to any particular risk, was or was not reasonable, and that his conclusion, therefore, 'would be a mere guess or arbitrary determination' *was omitted by an amendment.*" (Italics ours.)

And, generally, this court takes judicial knowledge of a wide range of general business customs and ways of conducting business, *Gibson v. Stevens*, 8 How. 384, 398; *Schollenberger v. Pennsylvania*, 171 U. S. 1, 7; *Louisville Trust Co. v. Louisville, etc., R. Co.*, 174 U. S. 674, 683.

In *Gibson v. Stevens*, the court said:

> "In examining the question between these parties, it is proper to say, that, *if the fact had not been admitted that the dealing* between McQueen & McKay and the plaintiff *was in the usual course of trade, the court would yet have felt itself bound to take judicial notice of it.* Apart from the fraud imputed to McQueen & McKay, of which Gibson had no knowledge, the statement of facts in this case describes *the usual course of the great inland commerce* by which the larger part of the agricultural productions of the valley of the Mississippi find their way to a market. It has existed long enough to assume a regular form of dealing, and it embraces such a wide extent of territory, and is of such general importance, that its ordinary course and usages are now publicly known and understood; and *it is the duty of the court to recognize them, as it judicially recognizes the general and established usages of trade on the ocean.*" (Italics ours.)

In *Schollenberger v. Pennsylvania*, the court said:

> "In the examination of this subject the first question to be considered is whether oleomargarine is an article of commerce? *No affirmative evidence from witnesses called to the stand and speaking directly to that subject is found in the record. We must determine the question with reference to those facts which are so well and universally known that courts will take notice of them without particular proof being adduced in regard to them, and also by reference to those dealings of the commercial world which are of like notoriety.*" (Italics ours.)

In *Louisville Trust Co. v. Louisville etc. R. Co.*, the court said:

> *"We may not shut our eyes to any facts of common knowledge."* (Italics ours.)

The case of *Brown v. Piper*, 91 U. S. 37, 42, involved facts of scientific knowledge generally known, rather than business customs and practices. But this court well expressed the function of judicial notice, as contrasted with pleading and proof, in language quite as applicable to this case, when it said:

> "The pleadings and proof in the case under consideration are silent as to the ice cream freezer. But it is a thing in the common knowledge and use of the people throughout the country. Notice and proof were, therefore, unnecessary. The statute requiring notice was not intended to apply in such cases. *The court can take judicial notice of it and give it the same effect as if it had been set up as a defense in the answer and the proof plenary.*" (Italics ours.)

Judicial Knowledge of Statutes of Indiana.

As to state statutes, this court has always taken judicial knowledge of them. *Junction R. Co. v. Bank of Ashland*, 12 Wall. 226; *Fourth National Bank v. Francklyn*, 120 U. S. 747; *Gerling v. Baltimore, etc., R. Co.*, 151 U. S. 673, 678.

In *Fourth National Bank v. Francklyn*, this court criticized the practice in the court below of actually introducing statutes in evidence, as a failure to recognize the doctrine of judicial notice. Over objection, this court considered a statute not so introduced.

Indeed, this court will take judicial knowledge that a statute, assailed as unconstitutional, has been repealed while the suit was pending (as is actually the case with the statute in question in the instant case). *Pure Oil Co. v. Minnesota*, 248 U. S. 158, 163.

THE FACTS JUDICIALLY KNOWN CONCLUSIVELY SHOW THAT THERE CAN BE NO POSSIBLE BASIS FOR THE CLASSIFICATION.

This court judicially knows that under the Indiana practice an action is legally commenced, so as to toll all limitations, when the complaint is filed and summons issued (Burns' Ann. Ind. Stat. 1933, Sec. 2-802; Acts of Indiana 1881, Spec. Sess., p. 240, Sec. 55), that foreign insurance companies doing business within the state are required by law to maintain and do maintain, resident agents for purposes of service (Burns' Ann. Ind. Stat. 1933, Sec. 39-1701, 1707; Acts of Indiana 1865, Spec. Sess., p. 105, Sec. 1; 1877, p. 65, Sec. 1; 1879, p. 551, Sec. 1; 1883, p. 116, Sec. 1), indeed, that service can be legally had upon the Commissioner of Insurance (Burns' Ann. Ind. Stat. 1933, Sec. 39-1707, 1708; Acts of Indiana 1883, p. 116, Secs. 1-2). It necessarily follows that under Indiana law, suit can be commenced, so as to bar the running of any contractual or statutory limitation, as easily against a foreign company as against a domestic company. (See our Brief in Support of Petition for Certiorari, page 15, and statutes quoted at length in Appendix, page 20 *et seq.*)

In its answer in this case, the defendant alleged that at all times while the alleged cause of action was

in existence, the defendant had been transacting business throughout Indiana, had had agents for service of process in practically every county of the state, and had maintained an office for the management of all its Indiana business in the city and county in which suit was actually filed, with agents upon whom, under these laws, service could be had. (Record, p. 19.) It seems to us that these allegations conclusively establish that the defendant was as fully and immediately amenable to suit and process in the plaintiff's action as any domestic company possibly could have been.

As we see it, differences, if any, in: (a) the business practices of the two classes of companies, (b) the difficulty of negotiating settlements with the two classes of companies, and (c) collecting claims and preparing for suits against the two classes of companies, and the mere fact of the necessity, if any, for determining whether the claimant shall sue a foreign company in Indiana or elsewhere, have no conceivable relation to the question of the time within which suit must be brought. They might be quite material as to statutes regulating the contractual limitation of time for giving notice of claim, or regulating the collection of judgments. But it is inconceivable what relation these things have to the time of commencing actions. The claimant is free at any time to file his action, commence his suit and toll the running of the limitation, and he can do it as easily and as quickly against the foreign company as against the domestic company.

Under the doctrine of the court's opinion in this case, how could the defendant ever do any more than it has already done in its answer? If the facts alleged in the answer and judicially known by the court, are

not enough to exclude any possible basis for the classification, what facts could be alleged or proved that would exclude them? If, as we contend, there is no conceivable basis for the classification assailed, what could we do, either by way of allegation or proof, other than to say that there is none?

THE DOCTRINE OF THIS CASE LAYS DOWN AN UNWORKABLE RULE.

In holding, in effect, that the defendant must exclude all conceivable bases, and also bases not conceived or conceivable, it seems to us not only that the court departs from the principles which it has heretofore followed, but that it lays down a rule for determining the constitutionality of statutes which is unworkable, and with which no litigant can possibly comply. These cases usually arise, as here, upon the pleadings. They present to the court a question of law, the solution of which is to be found, not in the facts of any particular case, but in facts generally known, of which the courts can and do take judicial knowledge. Of course, the pleading must present the question by alleging the unconstitutionality of the statute. The opposing party usually files no pleading of fact, but raises the question by a demurrer, as was done in this case. Thus, the court has the question presented to it, and it has before it the statute and the facts of which it can and does take judicial knowledge. These conditions have always been regarded as sufficient to impose upon the court the duty of deciding the constitutionality or unconstitutionality of the statute, not only for that particular case, but for all cases that may thereafter arise. And it seems to us that this duty is not dis-

charged by merely holding that the unconstitutionality of the statute has not been shown.

If, on the other hand, the pleader challenging the statute must allege the facts which the court already judicially knows, and must go farther and prove the non-existence of hypothetical facts, of the existence of which neither he nor the court can conceive, how can counsel discharge that burden. What can he do to enlighten the court, when the court must already know the pertinent facts as well as does he? Must the constitutionality of statutes in every case, regardless of the obviousness of the applicable facts, be tested upon the trial as a question of fact, rather than upon the pleadings as a question of law? And even at the trial, what metaphysical subtleties can be spun to prove the non-existence of the incomprehensible?

We think that these questions can be satisfactorily answered only by adhering to the doctrine that where a classification is challenged as arbitrary and unconstitutional, the court should consider it in the light of the facts judicially known, and that unless some reasonable basis for the classification can be seen and pointed out, upon the face of the statute, the statute must fall. If this court had been able to see such a basis in this case, it would undoubtedly have stated it in its opinion. Certainly, no one else would be better qualified by legal learning and general knowledge to point it out. As to ourselves, we cannot find it or conceive of it.

THE DEMURRER TO DEFENDANT'S ANSWER SHOULD HAVE BEEN OVERRULED.

In any event, however, even on the basis of the court's opinion in this case, we think it quite clear that the case should have been reversed, with instructions to overrule the demurrer to the defendant's answer. The court will recall that the petitioner (the defendant in the trial court) presented this question twice, once by demurrer to the plaintiff's complaint, which showed upon its face that the action was brought after the period of limitation contained in the bond, and thereafter by special answer, which alleged the unconstitutionality of the statute as in violation of the Equal Protection Clause of the Fourteenth Amendment.

Certain allegations of the answer have already been summarized (*supra*, p. 22).

The answer further alleged:

> "That such statute so [construed] constitutes an unreasonable and arbitrary discrimination against this defendant and all other companies organized under the laws of states other than Indiana and transacting a casualty insurance and fidelity bond business in the State of Indiana, and imposes burdens not imposed upon Indiana corporations transacting the same kind and class of business, and denies to defendant and others similarly situated the equal protection of the laws in contravention of the Fourteenth Amendment to the Constitution of the United States. That by reason thereof said statute of the State of Indiana is invalid and void and cannot and does not invalidate the provisions of the bond sued on." (Record, p. 19.)

The doctrine of this court in this case requires the challenging party to show facts and the non-existence of other facts pertinent to the reasonableness of the classification. Now, certainly, the quoted part of the defendant's answer alleges, as an ultimate fact, everything which it is necessary to allege in order to enable the defendant to make the factual showing required by that doctrine. If it is a conclusion, it is a conclusion of the evidentiary facts implied thereby and necessary to support it. Under the Indiana practice, the plaintiff's only remedy against such a conclusion is to move to require the defendants to state such facts.

The Indiana statute expressly provides:

> "Hereafter, in all pleadings * * * in any civil * * * case * * * all conclusions of fact stated therein shall be considered and held to be the allegation of all the facts required to sustain said conclusion when the same is necessary to the sufficiency of such pleading. * * * *Provided*, That as against such conclusion only the following remedy is given, that a motion may be made to require the party filing such pleading * * * to state the facts necessary to sustain the conclusion alleged, said motion setting out wherein such pleading * * * is insufficient. If no such motion is made and ruled upon, all objections on account thereof are waived." (Burns' Ann. Ind. Stat. 1933, Sec. 2-1005; Indiana Acts 1913, p. 850, Sec. 1; 1915, p. 123, Sec. 1; statute construed and applied by the Supreme Court of Indiana in *Fauvre Coal Co. v. Kushner*, 188 Ind. 314.)

The plaintiff filed no such motion, but demurred to the answer without challenging the conclusion, if such it was. The answer, therefore, cannot be questioned on the ground that it alleges conclusions. It is certainly broad enough to permit the defendant on the trial to introduce any evidence whatever, if evidence is necessary, to show the unreasonableness of the classification challenged.

THE COURT'S DECISION IN EFFECT DENIES PETITIONER THE OPPORTUNITY TO SHOW THE UNCONSTITUTIONALITY OF THE STATUTE.

With deference, we think that this court has inadvertently overlooked the fact that in unconditionally affirming the decisions of the Circuit Court of Appeals and of the District Court, it has denied us the right to show that the statute is unconstitutional. IT MUST BE REMEMBERED THAT THIS COURT'S OPINION DOES NOT HOLD THAT THE ACT IS CONSTITUTIONAL; IT MERELY HOLDS THAT THE PETITIONER HAS NOT SHOWN THAT IT IS UNCONSTITUTIONAL. But the defendant's answer was its first opportunity to show this in the manner in which the Supreme Court now holds it must be shown. It was sufficient under the Indiana practice to show it, if it could be shown. THE COURT SUSTAINED THE PLAINTIFF'S DEMURRER TO THIS ANSWER. THE LEGAL EFFECT OF THIS RULING WAS TO HOLD AS A MATTER OF LAW THAT THE ACT IS CONSTITUTIONAL, AND TO DENY THE DEFENDANT THE RIGHT TO SHOW THAT IT IS UNCONSTITUTIONAL. The defend-

ant had done all it could do to present the question of the unconstitutionality of the statute. Obviously, it could not plead further to present the question, and it had no other course but to refuse to do so. Upon such refusal, the court entered judgment for the plaintiff. UPON THAT JUDGMENT, THE ACT IS HELD CONSTITUTIONAL AS A MATTER OF LAW, AND IT IS THAT JUDGMENT WHICH IS HERE AFFIRMED, ALTHOUGH THIS COURT SAYS IN EFFECT THAT IT DOES NOT KNOW WHETHER THE ACT IS UNCONSTITUTIONAL OR NOT.

Obviously, whatever should have been the court's ruling upon the demurrer to the complaint, the court should not have sustained the demurrer to the answer. In so doing, the trial court made it impossible for the defendant to introduce evidence to meet the requirements which the Supreme Court now lays down for parties challenging the constitutionality of legislative acts. Upon the trial, the defendant might be able to introduce evidence upon which this court would have to hold that the classification is arbitrary and unconstitutional. It should not be denied this opportunity. Regardless of whether the court erred in overruling defendant's demurrer to the complaint, it necessarily erred in sustaining plaintiff's demurrer to defendant's answer. Therefore, this court should not affirm the judgment.

CONCLUSION AND SIGNATURES.

We respectfully submit, therefore, that the case should be reversed, and that in any event the court should reverse the case with instructions to overrule

the demurrer to defendant's answer, so that the case can proceed to trial, and a record can be made upon which this court can finally pass upon the constitutionality of the statute here challenged.

Respectfully submitted,

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Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 20.—October Term, 1934.

The Metropolitan Casualty Insurance Company of New York, Petitioner,
vs.
Kenneth V. Brownell, as Receiver of The Peoples National Bank and Trust Company.

On Writ of Certiorari to the Circuit Court of Appeals for the Seventh Circuit.

[March 18, 1935.]

Mr. Justice Stone delivered the opinion of the Court.

This case is here on writ of certiorari, 292 U. S. 620, to review a judgment of the Court of Appeals for the Seventh Circuit, upholding an Indiana statute challenged as unconstitutional. § 9139, Burns Anno. Stat. 1926; Indiana Acts, 1865, c. 15, § 6; § 39-1713, Burns Anno. Stat. 1933.

Respondent's predecessor in interest brought suit in the district court for southern Indiana to recover upon an indemnity bond executed by petitioner. The petitioner set up by answer and demurrer that it is a corporation organized under the laws of New York, carrying on in Indiana the business of writing casualty insurance contracts and surety bonds; that the claim for which suit was brought was presented to petitioner more than fifteen months before the suit was begun; that the indemnity bond contained a stipulation that no proceedings upon a claim upon the bond should be brought more than fifteen months after the date of the presentation of the claim; and that the Indiana statute, § 9139, declaring such provision invalid, is void because a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment. The district court gave judgment on the pleadings for respondent which the Court of Appeals affirmed. 68 F. (2d) 481.

The statute, construed by the Supreme Court of Indiana in *Caywood* v. *Supreme Lodge*, 171 Ind. 410, as applicable only to insurance corporations organized in states other than Indiana, forbids them to insert in their policies certain specified conditions, not

now material, and enacts that "any provision or condition contrary to the provisions of this section, or any condition in said policy inserted to avoid the provisions of this section, shall be void, and no condition or agreement not to sue for a period of less than three years shall be valid." There is no similar legislation applicable to domestic insurance companies carrying on the same class of business as petitioner. They are free to insert reasonable stipulations in their policies for a short period of limitation, cf. *Caywood* v. *Supreme Lodge, supra.* The statutory period of limitation for suits to recover money on indemnity policies is ten years. § 2-602, Burns Anno. Stat. 1933; cf. *Fidelity and Casualty Co.* v. *Jasper Furniture Co.*, 186 Ind. 566.

We may assume that the petitioner, by entering the State of Indiana and carrying on business there, is not barred from asserting that its legislation conflicts with the Federal Constitution, *Power Mfg. Co.* v. *Saunders*, 274 U. S. 490, 497, and we pass directly to the single question presented, whether the prohibition applied here to a foreign casualty insurance company infringes the Fourteenth Amendment because it is not likewise applied to domestic companies. Petitioner does not assail the prohibition as not within the scope of the legislative power or as itself so arbitrary or unreasonable as to be a denial of due process. It is not argued, nor could it be on the record before us, that the restriction would be unconstitutional if applied equally to both classes of corporations. Discrimination alone is the target of the attack.

The equal protection clause does not prohibit legislative classification and the imposition of statutory restraints on one class which are not imposed on another. But this Court has said that not every legislative discrimination between foreign and domestic corporations is permissible merely because they differ, and that with respect to some subjects of legislation the differences between them may afford no reasonable basis for the imposition of a statutory restriction upon foreign corporations, not applied to domestic corporations. The ultimate test of validity is not whether foreign corporations differ from domestic, but whether the differences between them are pertinent to the subject with respect to which the classification is made. *Power Mfg. Co.* v. *Saunders, supra*, 494. If those differences have any rational relationship to the legislative command, the discrimination is not forbidden. *Bond & Good-*

win & Tucker, Inc. v. *Superior Court*, 289 U. S. 361, 366; *National Union Fire Insurance Co.* v. *Wanberg*, 260 U. S. 71, 75. See *Clarke* v. *Deckebach*, 274 U. S. 392, 396.

Here the classification relates to the legislative command that insurance companies shall not by agreement limit the period within which suit may be brought on their contracts to less than three years. The record, briefs and arguments before us are silent as to legislation or other local conditions in Indiana bearing on the question whether there may be differences, in the circumstances attending suits brought against local companies and those brought against foreign companies, such as to justify a difference in the applicable periods of limitation. It is not argued that a reasonable time for bringing a suit against domestic insurance companies of Indiana may not, in some circumstances at least, differ from that for suing foreign corporations. We are not told whether, in 1865 when the challenged statute was enacted, or since, differences in the legislative schemes of the state affecting the two classes of casualty insurance companies, foreign and domestic, or differences in their business practices within the state, have or have not made more difficult and time-consuming the collection of claims and the preparations for litigation against foreign insurance companies than against domestic companies. But we are asked to say *a priori* that, in the circumstances attending the two classes of suits, there can be no differences pertinent to the legislative command; that there can be no reasonable basis for the legislative judgment that a different period of limitation should be applied to the one than to the other.

It is a salutary principle of judicial decision, long emphasized and followed by this Court, that the burden of establishing the unconstitutionality of a statute rests on him who assails it, and that courts may not declare a legislative discrimination invalid unless, viewed in the light of facts made known or generally assumed, it is of such a character as to preclude the assumption that the classification rests upon some rational basis within the knowledge and experience of the legislators.[1] A statutory discrimina-

[1] Erb v. Morasch, 177 U. S. 584, 586; Stebbins v. Riley, 268 U. S. 137, 143; Middleton v. Texas Power & Light Co., 249 U. S. 152, 158; Swiss Oil Corp. v. Shanks, 273 U. S. 407, 413, 414; Fort Smith Light & Traction Co. v. Board of Improvement Paving District No. 16, 274 U. S. 387, 391, 392; Clarke v. Deckebach, 274 U. S. 392; Silver v. Silver, 280 U. S. 117, 123; O'Gorman &

tion will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it. *Rast* v. *Van Deman & Lewis Co.*, 240 U. S. 342, 357; *Tax Commission* v. *Jackson*, 283 U. S. 527, 537.

The statutes of Indiana disclose a legislative scheme applicable to domestic casualty insurance companies differing radically from that applied to foreign corporations, and in some respects more exacting. Compare chapter 17 of Title 39, Burns Anno. Stat. 1933, with other chapters of that title. A pertinent difference which may be noted relates to the maintenance of a fund with a public officer for the protection of policyholders. Domestic companies are required to maintain with the state commissioner of insurance a guaranty fund in cash or approved securities, Burns Anno. Stat. 1933, §§ 39-1101, 39-1105, to be augmented by the addition of five per cent. of all dividends paid, § 39-118. These provisions appear not to be extended to foreign companies but they, like foreign corporations writing surety bonds, are permitted to maintain a guaranty fund of a different type with an officer of the state of incorporation. §§ 39-1703, 25-1401, 25-1402, 25-1301, 25-1304, Burns Anno. Stat. 1933.

There is no showing that the situation of foreign corporations, writing casualty insurance contracts in Indiana, is so similar to that of domestic corporations as to preclude any rational distinction between them as regards the time required for negotiating settlements of claims and the determination whether suits upon them should be prosecuted within or without the state. Where the record is silent, we cannot presume to declare that there is such similarity, or to say that a state is prohibited from making any distinction in the length of time within which suit must be brought. It is not beyond the range of probability that foreign casualty companies, as distinguished from domestic companies, generally keep their funds and maintain their business offices, and their agencies for the settlement of claims, outside the state. For aught that appears such is the actual situation. See *Concordia Life Insurance*

Young, Inc. v. Hartford Fire Ins. Co., 282 U. S. 251, 257, 258; Railway Express Agency v. Virginia, 282 U. S. 440, 444; Tax Commission v. Jackson, 283 U. S. 527, 537-541; Insurance Company v. Glidden Co., 284 U. S. 151, 158; Boston & Maine R. R. v. Armburg, 285 U. S. 234, 240; Lawrence v. State Tax Commission, 286 U. S. 276, 283; Concordia Life Insurance Co. v. Illinois, 292 U. S. 535, 547, 548.

Co. v. *Illinois*, 292 U. S. 535, 548. We cannot say that these considerations may not have moved the legislature to insist that a longer time should be given for bringing suit against foreign companies than the latter. It was competent for the legislature to determine whether such differences exist, and upon the basis of those differences, and in the exercise of a legislative judgment, to make choice of the method of guarding against the evil aimed at. *Standard Oil Co.* v. *Marysville*, 279 U. S. 582, 584; *Insurance Co.* v. *Glidden Co.*, 284 U. S. 151, 158, 159. It could likewise decide whether the differences are general enough, as respects foreign companies, to call upon it in the exercise of legislative judgment, not shown to be irrational, to say whether the legislative prohibition should be applied to them as a class rather than to members of it selected by more empirical methods. *Clarke* v. *Deckebach*, *supra*, 397; *Westfall* v. *United States*, 274 U. S. 256, 259; *Silver* v. *Silver*, 280 U. S. 117, 123.

For reasons already stated the question presented here is not affected by the fact that the Indiana legislature has pursued a different policy with respect to life insurance companies by extending, in 1909, to both domestic and foreign life insurance companies the prohibition applied here. § 39-802, Burns Anno. Stat. 1933. Discriminations between life and casualty insurance companies are not forbidden and cannot be assumed to be irrational. Considerations which may have led to the equality of treatment of foreign and domestic life insurance companies are not disclosed. Whatever they may have been, we cannot assume that they are equally applicable to casualty companies.

Affirmed.

Mr. Justice VAN DEVANTER, Mr. Justice MCREYNOLDS, Mr. Justice SUTHERLAND and Mr. Justice BUTLER dissent, because they are of opinion that the principles stated and applied in *Power Manufacturing Company* v. *Saunders*, 274 U. S. 490; *Kentucky Finance Corporation* v. *Paramount Auto Exchange Corporation*, 262 U. S. 544; *Hanover Fire Insurance Company* v. *Harding*, 272 U. S. 494; and *Guinn* v. *United States*, 238 U. S. 347, 363; require that the Indiana statute in question, as construed and applied in this case, be held void as contravening the equal protection clause of the Fourteenth Amendment, and that the judgment under review be reversed accordingly.